Supreme Court, U.S.
FILED
07-147 AUG 03 2007
OFFICE OF THE CLERK

No. ____

IN THE

Supreme Court of the United States

EDGE PETROLEUM OPERATING COMPANY, INC.,

Petitioner,

v.

DUKE ENERGY TRADING AND MARKETING LLC,

Respondent.

On Petition for Writ of Certiorari
to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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August 3, 2007

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the standard for "related to" bankruptcy removal jurisdiction should be expanded, as the court of appeals has done, from the already generous "some conceivable effect on the bankruptcy estate" standard to an even broader and ill-defined standard allowing for removal based on a "suspicion of an impact" on a bankruptcy estate that is "attenuated" and unrelated to a state court action between two non-debtor entities.

2. Whether the removal of a state court action that occurred some nine months after the bankruptcy filings of the debtors whose estates were "related to" the state court litigants was too late and therefore impermissible under 28 U.S.C. § 1334(b).

3. Whether lower courts erred in failing to abstain in this case.

LIST OF PARTIES TO THE PROCEEDING

The following entities are parties to the proceeding in the court below:

Edge Petroleum Operating Company, Inc., *Appellant*; and

Duke Energy Trading and Marketing, LLC, *Appellee*.

References to the other intervening parties involved in the lower federal court proceedings in this case, namely, GPR Holdings, Aurora Natural Gas LLC, Golden Prairie Resources LLC and Aurion Technologies, are omitted in this petition as those parties were involved in separate bankruptcy cases, which Petitioner understands have been resolved and closed.

CORPORATE DISCLOSURE STATEMENT

Petitioner Edge Petroleum Operating Company, Inc., is a Delaware corporation. The indirect parent company of Edge Petroleum Operating Company, Inc. is Edge Petroleum Corporation, a publicly traded Delaware corporation.

TABLE OF CONTENTS

Questions Presented for Review i

List of Parties to the Proceeding ii

Corporate Disclosure Statement ii

Table of Contents iii

Table of Authorities vi

Opinions Below 1

Statement of Basis for Jurisdiction 1

Statutory Provisions Involved 1

Statement of the Case 3

Argument 7

I. There is no Federal Jurisdiction in this Case – The Courts Below Erred in Allowing Removal Based on the Untimely Removal Notice Tied to the Bankruptcy Filing of Aurion Technologies 7

A. The Appellate Court Erred in Creating an "Attenuated" Standard for "Related to" Jurisdiction 8

B. Aurion Technologies' Bankruptcy is Too Remote to Edge's Claims Against Duke to Establish "Related to" Jurisdiction 14

C. The Lower Courts Erred by not Requiring Mandatory Abstention Under 28 U.S.C. § 1334(c)(2) 16

II. Voluntary Abstention was Proper – The Lower Courts Erred in not Remanding this Case to State Court 17

A. This Case Involves Matters of Great Importance, Including the Rights of the States to Regulate Producers and Purchasers of Oil, Gas and Other Natural Resources 17

B. The Harris County District Court has a Long and Well-versed History in Oil and Gas Cases and is Ready and Able to Hear the Case, Thereby Promoting Judicial Economy 19

C. No Harm Will Come to the Bankrupt in Allowing the State Court Litigation to Proceed 20

III. Conclusion 20

Appendix 23

United States Court of Appeals Opinion *In re TXNB Internal Case*, 483 F.3d 292 (5th Cir. 2007) 1a

Order on Appeal of the United States District Court for the Northern District of Texas, Dallas Division, affirming the Bankruptcy Court Opinion and Order 26a

Memorandum Opinion and Order of the United States Bankruptcy Court for the Northern District of Texas granting summary judgment in favor of Duke and dismissing Edge's lawsuit 27a

Judgment of United States Court of Appeals for the Fifth Circuit in No. 05-11492, *In re TXNB Internal Case*, denying rehearing and rehearing en banc 53a

Tex. Bus. & Com. Code § 9.343 ..... 55a

28 U.S.C. § 1334 ..... 63a

Fed. R. Bankr. P. 9027 ..... 65a

Aurion Technologies' internal memorandum dated July 23, 2001 ..... 70a

TABLE OF AUTHORITIES

Cases

Arnold v. Garlock, Inc., 278 F.3d 426 (5th Cir. 2001) 13

Burford v. Sun Oil Co., 319 U.S. 315 (1943)..... 18

Calpine Producer Services, L.P. v. Wiser Oil Company, 169 S.W.3d 783 (Tex. App.-Dallas, 2005) 19

Celotex Corp. v. Edwards, 514 U.S. 300 (1995)..... 9,10

Colorado v. Symes, 286 U.S. 510 (1932)..... 9

In re Bass, 171 F.3d 1016 (5th Cir. 1999) 12

In re Canion, 196 F.3d 579 (5th Cir.1999) 12,13

In re Medical Care Management Co., 361 B.R. 863 (2003) 18,19

In re Shirley Duke Associates, 611 F.2d 15, 18 (2d Cir. 1979) 11

In re TXNB Internal Case, 483 F.3d 292 (5th Cir. 2007) 1,8,16

In re Walker, 51 F.3d 562 (5th Cir. 1995) 12

In re Wood, 84 B.R. 432 (1988)..... 12

In re Zale Corp., 62 F.3d 746 (5th Cir. 1995)..... 15

Kontrick v. Ryan, 540 U.S. 443 (2004)..... 7

Matter of Paso Del Norte Oil Co., 755 F.2d 421 (5th Cir. 1985)..... 10

Matter of Wood, 825 F.2d 90 (5th Cir. 1987) 11,15

Pacor, Inc. v. Higgins, 743 F.2d 984 (3d Cir. 1984) 10,11,13

Pelto Oil Corp. v. CSX Oil & Gas Corp., 804 S.W.2d 583 (Tex. App.-Hous. [1st Dist.] 19[illegible] 19

Quackenbush v. Allstate Ins. Co., 517 U.S. 706 (1996) 18

Watson v. Philip Morris Companies, Inc., 551 U.S. ----, 127 S. Ct. 2301 (2007) 8,9,14

Statutes

1978 Bankruptcy Act 9

28 U.S.C Section 1254(1) 1

28 U.S.C. § 1334 (1984) 2,4,9,10,11,18,21

28 U.S.C. § 1334(b) 2,8

28 U.S.C. § 1334(c)(1) 18

28 U.S.C. § 1334(c)(2) 2,16,17

28 U.S.C. § 1367(a) 16

28 U.S.C. §1442(a)(1) (1996) 8,9

Fed. R. Bankr. P. 9027 3,7

Fed. R. Bankr. P. 9027(a)(2) 2,7

Tex. Bus. & Com. Code § 9.343 (2001) 2,4,5

Tex. Bus. & Com. Code § 9.343(a) 1

Tex. Bus. & Com. Code § 9.343(m) 4,5,14

Texas Mineral Lien Act 4,18

Other Authorities

Notice of the Death of Chief Justice Taney, 2 Cliff. 614 (1st Cir. 1870) 17

Random House Unabridged Dictionary, Random House, Inc. 2006 8

PETITION FOR WRIT OF CERTIORARI

Petitioner Edge Petroleum Operating Company, Inc. ("Edge") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported at *In Re TXNB Internal Case,* 483 F.3d 292 (5th Cir. 2007) and is attached in the Appendix at pages 1a-25a). The order of the district court affirming the bankruptcy court's opinion, attached in the Appendix at page 26a, is unreported. The memorandum opinion and order of the bankruptcy court dismissing Edge's action against Duke is also unreported and is attached in the Appendix at pages 27a - 52a.

STATEMENT OF BASIS FOR JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered its judgment on March 28, 2007. The Fifth Circuit's orders denying the petitions for panel rehearing and rehearing en banc were entered on May 7, 2007.[1] This Court has jurisdiction under 28 U.S.C Section 1254(1) governing certiorari review of decisions of the courts of appeal.

STATUTORY PROVISIONS INVOLVED

Title 1, Chapter 9, Section 9.343(a) of the Texas Business and Commerce Code provides, in relevant part: "This section provides a security interest in favor of interest

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[1] The order denying Edge's petition for rehearing en banc and its petition for panel rehearing is attached in the Appendix at pages 53a - 54a.

owners, as secured parties, to secure the obligations of the first purchaser of oil and gas production, as debtor, to pay the purchase price." Tex. Bus. & Com. Code § 9.343 (2001). Pursuant to this Court's Rule 14.1(f), the entire text of Tex. Bus. & Com. Code § 9.343 is attached at Appendix pages 55a - 62a.

Title 28, Section 1334(b) states, in pertinent part: "the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11." 28 U.S.C. § 1334 (1984).

Section 1334(c)(2) of Title 28 provides:

> "Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction."

28 U.S.C. § 1334. Pursuant to this Court's Rule 14.1(f), 28 U.S.C. § 1334 is attached at Appendix pages 63a - 64a.

Federal Rule of Bankruptcy Procedure 9027(a)(2) provides:

> "If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in

> the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under Sec. 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief."

Fed. R. Bankr. P. 9027. Pursuant to this Court's Rule 14.1(f), Fed. R. Bankr. P. 9027 is attached at Appendix pages 65a - 69a.

STATEMENT OF THE CASE

"Totto, I have a feeling we're not in Kansas anymore."--
Dorothy

In the classic movie, *The Wizard of Oz*, Dorothy found herself suddenly removed from Kansas in a whirlwind of confusion, landing unexpectedly in the perplexing new world of Oz. What happened to Edge in this case is remarkably similar, and just as bizarre. This case involves Texas natural gas produced from Texas lands and leases by a Texas producer and sold to Texas buyers, for which payment was not made in the state of Texas, as required by contracts, which were signed in Texas and have Texas choice of law provisions, and for breach of which the producer sought to enforce certain lien rights arising under Texas statutes and laws in a Texas state court. There is nothing federal here involved – not in the least. Edge's state court petition against Duke had no conceivable effect on any pending bankruptcy proceeding, except those for which it was too late to remove, and therefore, its removal to the federal court (and hence the bankruptcy court) was improper.

Texas, like all producing states, has a long history of regulating its oil and gas industry. This history goes back

to the 1920s shortly after the discovery of oil at Spindletop in 1901.[2] It predates by almost six decades the federal "related to" statute here involved and embodied in 28 U.S.C. § 1334. The Texas regulatory scheme includes laws and regulations covering virtually every aspect of exploring for, producing, selling and transporting oil and natural gas, with a breadth and depth of coverage that is comprehensive. As part of this history, the Texas legislature in 1983 enacted the Texas Mineral Lien Act, now codified as Section 9.343 of Article 9 of the Texas Business and Commerce Code,[3] as a nonuniform provision to the Uniform Commercial Code adopted in most states. This statute and its history are fully discussed in Edge's briefs in the appellate court. Basically, the statute grants a security interest lien in favor of producers of Texas oil and natural gas to secure their payment from the first purchaser of such products. It was enacted to give oil and gas producers a financial incentive by encouraging them to drill new wells in light of the collapse of the domestic oil and gas industry in the early 1980s. The statute is designed to protect the rights of unpaid oil and gas producers, like Edge, by ensuring that their claims are given priority over general unsecured claims when an operator or oil or gas purchaser files for bankruptcy relief. Section 9.343(m) of this law affords a person such as Duke who buys from a first purchaser, a way to ensure that its purchase is free and clear of the lien and security interest of the producer or interest owner by either buying in the ordinary course or taking certain other required steps set forth in the statute. The remedies and relief these statutes afford are clearly state, not federal, in nature.

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[2] As early as 1917, the Texas legislature appointed the Texas Railroad Commission as the agency to administer the conservation laws relating to oil and gas and in 1920 the state legislature gave the Texas Railroad Commission jurisdiction over all production and sale of natural gas.

[3] Attached at Appendix pp 55a - 62a in this writ.

The facts in this case are straight forward and uncontroverted. Edge is the producer of the natural gas at issue. Through a contract entered into by an agent, Edge sold and delivered the natural gas to Aurora Natural Gas, LLC (herein "Aurora" or "Aurora Natural Gas"), as buyer. There was evidence in the case that Aurora assigned its contract to another entity, namely Golden Prairie Supply Services, LLC ("Golden Prairie"). Golden Prairie and Aurora then resold the gas to Duke Energy Trading & Marketing, LLC ("Duke"). There was also evidence that at some point, Aurora was merged with and into GPR Holdings, LLC ("GPR") (GPR, Golden Prairie and Aurora are collectively referred to herein as "Debtors"). Thus, Edge produced and sold natural gas over the periods in question to three entities: Aurora, Golden Prairie and GPR. The Debtors and another corporation, Aurion Technologies, LLC ("Aurion Technologies"), which was an internet web-based communications company not in the natural gas purchasing business, were owned or controlled by Dennis McLaughlin and GPR Holdings, LLC.

Edge was not paid for the gas produced and sold to Debtors for the months of May and June 2001. Previous to these sales, Duke had made payments to the Debtors for gas it had purchased from them, but, Debtors, offering Duke a significant discount for immediate payment outside of the normal course of business, exploited Duke's automated accounts payable system, by submitting duplicate invoices and obtaining payment for the same gas. Realizing its mistake, Duke nevertheless continued to purchase gas from Debtors but began withholding payments as part of a self-help strategy to recoup its earlier overpayments, including for the gas Edge produced and sold to Debtors in May and June 2001. Duke took none of the required steps set forth in § 9.343(m) of the Texas Business and Commerce Code to ensure its purchases of

gas were free and clear of Edge's security interest and lien in that gas, and resold the gas to end users in the stream of commerce. Edge filed its state-court petition against Duke on September 5, 2001 to enforce its statutory lien rights under § 9.343. Notably, Edge never filed a lawsuit, proof of claim or legal proceeding of any type against the Debtors or Aurion Technologies or sought to recover any property from Debtors'[4] or Aurion Technologies' bankruptcy estates, electing instead to pursue its state-law claims against Duke for enforcement or conversion of its security interest and lien rights in the gas.

The Debtors then began to file bankruptcy. Golden Prairie filed on August 20, 2001 and Aurora filed on August 13, 2001. GPR Holdings filed on August 14, 2001. Then, on March 4, 2002, Aurion Technologies filed its voluntary petition for bankruptcy, and based on that filing, Duke removed the state court action on May 17, 2002, some nine months after the bankruptcy filings of Golden Prairie and Aurora. Although Duke arguably could have removed the case as soon as Aurora or Golden Prairie filed bankruptcy, it chose not to do so. Instead, Duke sat idly by for nine months while at least three arguably relevant bankruptcy petitions were filed and the time for removal based on those petitions had expired. Only when discovery was complete and the case was within weeks of trial did Duke attempt to remove the case, based on the later-filed bankruptcy petition of Aurion Technologies, an entity wholly unrelated to the transactions at issue.

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[4] As part of a voluntary settlement of competing lien claims *vis a vis* the other secured lenders, Edge received a small portion of its losses ($250,000) collectively from GPR Holdings and Bayerische Hypo-Und Veriens Bank, a secured lender of GPR Holdings, but filed no proof of claim or otherwise sought relief from any of the Debtors, including GPR and Aurion Technologies, or any of their secured or unsecured creditors.

Edge petitions this Court for writ of certiorari to answer the subject matter jurisdiction question.

ARGUMENT

I. There is no Federal Jurisdiction in this Case - The Courts Below Erred in Allowing Removal Based on the Untimely Removal Notice Tied to the Bankruptcy Filing of Aurion Technologies.

Duke's removal was untimely as to all of the Debtors' bankruptcy filings except that of Aurion Technologies. Bankruptcy Rule 9027(a)(2) sets the time limits for filing of a notice of removal. Duke ignored those time limits. Duke never asked for an extension of time for removal of Edge's state court suit against it as "related to" the GPR, Golden Prairie or Aurora Natural Gas bankruptcies. While timeliness of the notice of removal may be "procedural," rather than jurisdictional, meaning that the protections of timely removal if not objected to before trial may be waived or forfeited, the record is clear that Edge immediately objected to Duke's untimely removal. Rule 9027's deadline establishing time requirements for removal must mean something when policed by the opposing party. And what it must mean is that when the party prejudiced by its breach objects, the invocation of jurisdiction must be dismissed as untenable. cf. *Kontrick v. Ryan* 540 U.S. 443, 454-58 (2004). To allow Duke to base jurisdiction in the bankruptcy court based on the earlier-filed petitions of the Debtors would impermissibly undermine the notice filing requirements set forth in the Federal Rules of Bankruptcy Procedure. The federal courts were incorrect in taking jurisdiction of this case nine months after the original bankruptcy filings of the Debtors based on the tenuous "attenuated" bankruptcy filing of Aurion Technologies.

A. The Appellate Court Erred in Creating an "Attenuated" Standard for "Related to" Jurisdiction.

Jurisdiction in this case turns on whether the standard for "related to" bankruptcy removal jurisdiction is expanded, as the court of appeals has done, from the already generous "some conceivable effect on the bankruptcy estate" standard to an even broader and ill-defined standard. The court of appeals permitted an exercise of federal jurisdiction over Edge's state-court claims against Duke, two non-debtors, based on Aurion Technologies' "attenuated" relationship to that estate and the subject matter of the state-court suit. *In re TXNB Internal Case,* 483 F.3d at 299. The word selected in describing the pivotal jurisdictional connection, "attenuated", is the Fifth Circuit's, not ours. According to Random House Unabridged Dictionary, "attenuate" means: "to weaken or reduce in force, intensity, effect, quantity or value. To become thin or fine; lessen, weakened; diminishing". *Random House Unabridged Dictionary*, Random House, Inc. 2006. "Related to" a bankruptcy as a source of otherwise unavailable federal jurisdiction must be cabined by some principled restraint and mean more than this. A "weakened, reduced or lessened" connection is not "related to" such matters for purposes of 28 U.S.C. § 1334(b). The Fifth Circuit's formula constitutes an impermissibly broad expansion of the law of removal.

In the recent case of *Watson v. Philip Morris Companies, Inc.*, 551 U.S. -----, 127 S. Ct. 2301 (2007), the Court reviewed federal removal jurisdiction in the context of whether a private company's activities could constitute "acting under" an officer or agency of the United States under the federal officer removal statute, 28 U.S.C. § 1442(a)(1) (1996), and thereby permit the private

company to remove a state-court action to federal court. This Court held that they do not. The Court pointed out that the words "acting under" are broad, and the statute must be liberally construed, citing *Colorado v. Symes*, 286 U.S. 510, 517 (1932). But the Court further held that "broad language is not limitless. And a liberal construction nonetheless can find limits in a text's language, context, history, and purposes." *Watson*, 551 U.S. at ----, 127 S. Ct. at 2305. There, the Court applied this analysis and found the federal officer removal statute in 28 U.S.C. § 1442(a)(1) is not so broad as to include a private firm's compliance with federal laws, rules and regulations within the scope of the statutory phrase "acting under" a federal official.

The federal removal statute here involved is similar to the federal officer removal statute examined by the Court in *Watson*. The statute in this case, 28 U.S.C. § 1334, provides for removal of state court actions that are "related to" the bankruptcy proceedings of a debtor. Applying the Court's directives in *Watson* to this case, we look first at the history of the statute. The "related to" language in 28 U.S.C. § 1334 was revised to its present form in 1984 to correct certain perceived jurisdictional failings of the 1978 Bankruptcy Act. 28 U.S.C. § 1334 lists the types of matters over which the district court has jurisdiction, including cases under title 11, proceedings "arising under" title 11, proceedings "arising in" a case under title 11 and proceedings "related to" a case under title 11. While 28 U.S.C. § 1334 establishes federal jurisdiction for proceedings "related to" a case under title 11, it does not define the term "related to". This Court established guidelines for determining "related to" in federal courts with *Celotex Corp. v. Edwards*, 514 U.S. 300, 308 n.5 (1995). In *Celotex*, the Court stated that "related to" bankruptcy proceedings include "suits between third parties

which have an effect on the bankruptcy estate" and stated that:

> "In attempting to strike an appropriate balance, the Third Circuit in *Pacor, Inc. v. Higgins*, 743 F.2d 984 (3d Cir. 1984), devised the following test for determining the existence of 'related to' jurisdiction:
>
> > 'The usual articulation of the test for determining whether a civil proceeding is related to bankruptcy is whether the *outcome of that proceeding could conceivably have any effect on the estate being administered in bankruptcy*.... Thus, the proceeding need not necessarily be against the debtor or against the debtor's property. An action is related to bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and which in any way impacts upon the handling and administration of the bankrupt estate.' (emphasis in original; citations omitted).
>
> The First, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, and Eleventh Circuits have adopted the *Pacor* test with little or no variation. ... The Second and Seventh Circuits, on the other hand, seem to have adopted a slightly different test. ... But whatever test is used, these cases make clear that bankruptcy courts have no jurisdiction over proceedings that have no effect on the debtor." (citations omitted)

Celotex, 514 U.S. at 308.

Turning to precedent, prior to the adoption of the definition of "related to" in accordance with *Pacor*, the Fifth Circuit, in the *Matter of Paso Del Norte Oil Co.*, 755 F.2d 421, 424 (5th Cir. 1985), held to a narrower interpretation of "related to" under Section 1334 and found that "a court of bankruptcy has no power to entertain collateral disputes between third parties that do no involve the bankrupt or its property ... nor may it exercise jurisdiction over a private controversy which does not relate to matters pertaining to bankruptcy." (Quoting *In re Shirley Duke Associates*, 611 F.2d 15, 18 (2d Cir. 1979).)

In 1987, in *Matter of Wood*, 825 F.2d 90, 93 (5th Cir. 1987), which was a case of misappropriation of corporate assets against debtor and a third party (a director/stockholder of debtor's business), the Fifth Circuit expanded its definition of "related to" by adopting the *Pacor* definition. The court, quoting *Pacor,* 743 F.2d at 994, stated:

> "For the purpose of determining whether a particular matter falls within bankruptcy jurisdiction, it is not necessary to distinguish between proceedings 'arising under', 'arising in a case under', or 'related to a case under', title 11. These references operate conjunctively to define the scope of jurisdiction. Therefore, it is necessary only to determine whether a matter is at least 'related to' the bankruptcy. The Act does not define 'related' matters. Courts have articulated various definitions of 'related', but the definition of the Court of Appeals for the Third Circuit appears to have the most support: 'whether the outcome of that proceeding *could conceivably* have any effect on the estate being administered in bankruptcy.' This definition comports with the legislative history of

> the statutory predecessor to section 1334. ... We adopt it as our own." (emphasis added)

However, after adopting this "related to" definition to determine jurisdiction, the Fifth Circuit went on to remand *Wood* back to the bankruptcy court, where that court, in *In re Wood*, 84 B.R. 432 (1988) found that discretionary abstention was permissible in non-core proceedings, that "related to" issues were non-core proceedings and that, since the claims alleged were all state-law causes of action, the defendants' motion to abstain was granted and the cause dismissed without prejudice.

The Fifth Circuit has continued to expand the "related to" definition, allowing federal courts to exercise jurisdiction in bankruptcy matters where state courts are concerned. In *In re Bass*, 171 F.3d 1016, 1022 (5th Cir. 1999), the Fifth Circuit stated that "related to" also included any claim that "could conceivably affect" a debtor's estate or the administration thereof. Quoting *In re Walker*, 51 F.3d 562, 569 (5th Cir. 1995), the Fifth Circuit held that "[a]n action is 'related to' bankruptcy if the outcome could alter the debtor's rights, liabilities, options, or freedom of action (either positively or negatively) and ... in any way impacts upon the handling and administration of the bankruptcy estate" and ruled that "[t]his test is obviously conjunctive: For jurisdiction to attach, the anticipated outcome of the action must both (1) alter the rights, obligations, and choices of action of the debtor, and (2) have an effect on the administration of the estate."

The "could conceivably have an effect" standard for determining "related to" jurisdiction was further expanded by the Fifth Circuit in *In re Canion*, 196 F.3d 579, 585 (5th Cir. 1999). In this case, a suit brought by judgment creditors against the friends, relatives, business associates and employees of a judgment debtor, the Fifth Circuit

determined that an expectation of success was not required to attach "related to" jurisdiction, stating that:

> "Courts in other circuits that have faced this question have held that a claim between two non-debtors that will potentially reduce the bankruptcy estate's liabilities produces an effect on the estate sufficient to confer 'related to' jurisdiction. ... The law is well established in this Circuit, as in others, that, when testing 'related to' jurisdiction, an effect is not required to a certainty. Rather, jurisdiction will attach on a finding of any conceivable effect."

Id. at 587.

This principle of "certainty not required" was applied shortly thereafter in *Arnold v. Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir. 2001). The Fifth Circuit stated that while its test, along with that of most other federal circuits, for determining whether a proceeding properly invoked federal bankruptcy jurisdiction under the "related to" definition was the same as the Third Circuit's *Pacor* test, i.e., whether the outcome of that proceeding could conceivably have any effect on the debtor's estate, certainty or even likelihood of such an effect is not a requirement (quoting *In re Canion*, 196 F.3d at 587 n.30).

In all of the above cases, at least one party to the litigation was either a debtor or connected to the debtor, either as a subsidiary, family member or shareholder. The facts of the case at issue are entirely different – neither Edge nor Duke are the debtor or directly or indirectly connected to the debtor. It would appear that the Fifth Circuit has continued its trend in the case at issue, by expanding the definition of "related to" to include claims between two non-debtor entities that, as the discussion below will illustrate, do not include a claim that could

conceivably affect the estate of the Debtors or Aurion Technologies, a stranger to the gas sale transaction.

B. Aurion Technologies' Bankruptcy is Too Remote to Edge's Claims against Duke to Establish "Related to" Jurisdiction.

Following this Court's *Watson* analysis and looking now to context, there is nothing in the record in this case showing any genuine connection between Edge's claims against Duke and Aurion Technologies. Duke makes the facial allegation that Aurion Technologies might have received from the Debtors some of the overpayments Duke made to the Debtors. No proof was submitted by Duke or considered by the lower courts to support this naked allegation. But even assuming, *arguendo*, uncontested proof of Aurion Technologies' receipt from the Debtors of some proceeds of Duke's overpayments existed, this circumstance would not have been sufficient to maintain "related to" jurisdiction. Edge's action in state court did not seek to recover such payments. Here, in fact, Edge asserted no claim against Aurion Technologies or its property, not in state court, not in federal court, not in bankruptcy court, not anywhere, not even in Oz. An action is related to a bankruptcy case, for purposes of "related to" bankruptcy jurisdiction, "if the outcome could conceivably have an effect on the bankruptcy estate". If, in fact, Aurion Technologies had actually received some of the mistaken overpayments from Duke, it well might have an obligation in law or equity, depending on the circumstances, to refund those monies to the Debtors or to Duke, but *not* because of Edge's state-law action to enforce its lien rights in the gas Duke sold in the stream of commerce. Edge was not, and is not now, seeking any payments from Aurion Technologies. Its claim lies against Duke because Duke, failing in its duty under Section 9.343(m) of Article 9 of

the Texas Business and Commerce Code, cannot get credit against Edge as producer under Texas law for any payment Duke made for the gas – whether once or twice – to Debtors, or even Aurion Technologies – had it directly paid Aurion Technologies.

Stated another way, Edge's claims against Duke for enforcement or conversion of its security interest and lien rights in the gas produced by Edge and sold by Duke into the stream of commerce could not conceivably result in a claim against Aurion Technologies' estate. In fact, by its own admission, Aurion Technologies is a web-site communications and technology company[5], and there is absolutely no evidence that it has ever been involved in the oil and gas industry, much less transactions forming the basis of Edge's lawsuit. Since Edge is seeking nothing in terms of relief against Aurion Technologies or its property, and the outcome of Edge's state court action could not possibly affect Aurion Technologies' estate, Aurion Technologies' relationship to the parties is too remote to satisfy the existing "related to" standard in the Fifth Circuit of whether "the outcome of the proceeding could conceivably have an effect on the estate being administered." *See*, *Matter of Wood*, 825 F.2d at 93; *In re Zale Corp.*, 62 F.3d 746, 752 (5th Cir. 1995). Was Aurion Technologies' relationship to the parties an "attenuated", *i.e.*, "lessened", "weakened" or "diminishing" connection under the standard proposed by the Fifth Circuit in this case? — possibly, but this is not the legal standard for "related to" jurisdiction and, we respectfully submit, goes too far in expanding the powers of the federal courts. We ask this Court to limit the reach of the bankruptcy removal statute by limiting the right to remove in this case to the bankruptcy filings of Golden Prairie, Aurora and GPR Holdings – the Debtors who Edge sold gas to and who

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[5] See Aurion Technologies' internal memorandum dated July 23, 2001 in the Appendix, pages 70a - 71a.

received such gas and truly were "related to" Edge's claims in this case, and not create a new, fictional "attenuated" standard applicable to unrelated debtors upon whom the state-court action has no conceivable effect.

C. The Lower Courts Erred by not Requiring Mandatory Abstention Under 28 U.S.C. § 1334 (c)(2).

Even if the lower court's jurisdictional determination is affirmed, abstention should still have been required in this case by Title 28's mandatory abstention provision. At best, if Duke had filed a timely removal as related to the GPR, Aurora and Golden Prairie cases, mandatory abstention would have been required. When removed as to Aurion Technologies, abstention is imperative. There is no independent basis of federal jurisdiction. This fact alone mandates abstention in this case. In refusing to require mandatory abstention, the Fifth Circuit erred by characterizing Edge's state court petition against Duke as a core proceeding against the Debtors, thereby allowing for an independent basis of supplemental federal jurisdiction under 28 U.S.C. § 1367(a). Specifically, the appellate court noted that "the complaint was drafted broadly enough to provide the right to pursue a claim against the proceeds of sale from the Debtors to Duke as well as the proceeds of the sale from Duke to third parties." *In re TXNB Internal Case*, 483 F.3d at 300. But Edge never sued the Debtors or Aurion Technologies, and it would have to have sought and obtained relief from the automatic stay in order to do so -- steps which Edge did not take. Edge only named Duke in its state court petition, and never amended its petition to seek relief from anyone else. To assume here, as the appellate court does, that because of the perceived "broadness" of Edge's pleading Edge intended to amend its pleading, seek relief from stay and assert claims against the Debtors is, we respectfully submit, to assume jurisdiction

that the federal courts do not have. This assumption of jurisdiction cannot help but call to mind the admonition of Justice Benjamin R. Curtis, one of the notable members in the Court's history, who, speaking on the occasion of the death of Chief Justice Taney, said "Let it be remembered, also, for just now we may be in some danger of forgetting it, that questions of jurisdiction were questions of power as between the United States and the several states." *Notice of the Death of Chief Justice Taney*, 2 Cliff. 614 (1st Cir. 1870). We respectfully submit the appellate court was wrong in finding an independent basis for federal jurisdiction thereby prohibiting mandatory abstention under 28 U.S.C. § 1334(c)(2).

II. Voluntary Abstention was Proper – The Lower Courts Erred in not Remanding this Case to State Court.

A. This Case Involves Matters of Great Importance, Including the Rights of the States to Regulate Producers and Purchasers of Oil, Gas and Other Natural Resources.

One might regard the questions raised here as only theoretically applicable to the two state-court litigants involved, and not far-reaching in their impact on the nation at large. But this is patently not the case. According to data available at the Texas Railroad Commission and the Texas Independent Producers and Royalty Owners Association, there are currently over 3,600 independent and major producers of oil and gas operating in virtually every county in the state of Texas[6] and literally thousands of working interest co-partners, mineral and royalty interest owners, all of whom will be *directly affected* by the Court's

[6] There are 254 counties in the State of Texas. According to the Texas Railroad Commission, there are active oil and gas wells in 243.

decision in this case. The Court's ruling will also have implications on countless oil and gas producers, royalty and other interest owners in other producing states with similar statutory schemes as the Texas Mineral Lien Act. By Edge's count, there are at least twenty other states that have significant oil and gas production and their own unique statutory systems of lien preferences and priorities affecting producers and purchasers of oil and natural gas in those states.[7] Deference to state processes and proceedings has long been articulated under 28 U.S.C. § 1334(c)(1) under the *Burford* doctrine for permissive abstention (*Burford v. Sun Oil Co.*, 319 U.S. 315 (1943)). This is particularly true where the case presents formidable questions of state law that bear on policy problems of substantial public significance to the states and whose importance transcends the result in the case at bar, or where adjudication in federal court would disrupt or interfere with state efforts to establish a coherent policy over a matter of substantial public (state) concern. *See, e.g., Quackenbush v. Allstate Ins. Co.*, 517 U.S. 706, 726-27 (1996); *In re Medical Care Management*, 361 B.R. 863 (2003). Edge's petition in state court to enforce its lien rights for payment for the gas it produced and sold involves both legal and equitable state laws that are of such a nature, we respectfully submit, as to fall into this category. And there can be no doubt that Texas, like other producing states, has long sought to address significant public policy concerns through its comprehensive statutory and regulatory scheme establishing a coherent system of regulation of the oil and gas industry, including establishing certain payment incentives and lien priorities affecting producers and purchasers of oil and natural gas, as seen in the Texas

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[7]Arkansas, Alaska, Alabama, California, Colorado, Florida, Kansas, Kentucky, Illinois, Louisiana, Mississippi, New Mexico, Oklahoma, North Dakota, Pennsylvania, Nevada, Ohio, Utah, West Virginia and Wyoming. No attempt is herein made to analyze the separate lien provisions of each producing state.

Mineral Lien Act here involved, as part of the state's overall public goal of encouraging and regulating oil and gas production. As discussed earlier, the states' interest in regulating oil and gas has long been deemed a state rather than federal interest, even before Congress enacted the present version of 28 U.S.C. § 1334.

B. The Harris County District Court has a Long and Well-versed History in Oil and Gas Cases and is Ready and Able to Hear the Case, Thereby Promoting Judicial Economy.

In addition to these notions of comity, which support a finding of cause for abstention in this case, the Texas state courts and particularly the Harris County District Court, which sits in Houston, Texas -- the oil and gas capital of the nation – have a long and well-versed history in oil and gas matters, including oil and gas contracts and even the specific statutes here involved. *See, e.g., Pelto Oil Corp. v. CSX Oil & Gas Corp.*, 804 S.W.2d 583 (Tex. App.-Hous. [1st Dist.] 1991) and *Calpine Producer Services, L.P. v. Wiser Oil Company*, 169 S.W.3d 783 (Tex. App.-Dallas, 2005). By failing to require abstention, not only would this Court or the lower federal courts (including the bankruptcy court) be required to interpret and apply certain portions of state law, which the state courts have already done on numerous occasions, it would also be required to interpret the order of lien priorities, liquidation, foreclosure and other remedies created by the unique state statutory system here involved. Litigation of these matters in the Harris County District Court would therefore promote judicial economy. *Cf, In Re Medical Care Management*, 361 B.R. 863-879 (finding abstention proper in the context of Tennessee's extensive state insurance regulatory scheme).

C. No harm Will Come to the Bankrupt in Allowing the State Court Litigation to Proceed.

Finally, contrary to the contentions of Duke, proceeding with litigation of Edge's petition in the Harris County District Court would not have harmed Aurion Technologies' estate or the interest of other creditors. Whether Aurion Technologies received part of the alleged overpayment from Duke, the related question of who owns those funds and whether they must be returned to Duke as the rightful owner or to the estates of GPR or Aurora Natural Gas, are all questions that must be determined by applying applicable state law concepts of equity and unjust enrichment, which Duke would, and did, assert, *regardless of whether Edge had brought its state-court action.* Stated another way, Edge's petition in state court has no effect on Aurion Technologies' obligation to repay monies it is not rightfully entitled to keep and that should be turned over to the true owner in equity and good conscience. Aurion Technologies, as the recipient of those funds, owed Duke that obligation anyway. Edge's claim that Duke, despite payment to anyone other than Edge, is still liable to Edge for the security interest in the gas sold or its proceeds, did not change or effect that result.

III. Conclusion.

It has always been the case in our uniquely American system of dual state and federal jurisprudence that this Court is perpetually open to, and must be the final arbiter of, arguments going to the very nature and extent of the lower court's powers, be they state or federal. In summary, this is a suit between two Texas non-debtors wholly unrelated to Aurion Technologies' bankruptcy proceedings, and not removable as to the filings of Debtors, because with respect to those filings, Duke waited too long to

remove. The impermissible "attenuated" standard announced by the Fifth Circuit should be rejected. As the bankruptcy court lacked jurisdiction and/or was required to abstain in this case, remand to the state court for trial is appropriate. Should this Court find, however, that this matter was properly before the bankruptcy court, abstention was proper and should have been required. Several factors weigh in favor of this: (1) there are clearly strong state policy interests presented since Texas has established an orderly system for lien rights and priorities affecting producers and purchasers of oil and natural gas (*i.e.*, Edge and Duke in this case) and for the enforcement of those rights, the regulation and implementation of which has long been recognized by both the states and the federal government as one having primarily state policy implications; (2) these policy and comity considerations are at least as strong, if not stronger, than any perceived federal interest in retaining jurisdiction; (3) considerations of judicial economy weigh in favor of litigating Edge's petition in state court; and (4) there is an absence of harm to the Aurion Technologies estate if the state court is permitted to proceed on the petition. All of these factors support this Court finding that under 28 U.S.C. § 1334, there is no federal "related to" jurisdiction in this case, but that if there was, abstention should have been exercised and the case remanded.

Edge respectfully prays that this Court vacate the final judgments of the Fifth Circuit, the lower federal district courts and the Bankruptcy court and reinstate the case for trial back in the District Court of Harris County, Texas, where it belongs.

The petition for writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

In the
United States Court of Appeals
for the Fifth Circuit

_05-11492

In the Matter of

TXNB Internal Case,

Debtor.

Edge Petroleum Operating Company, Inc.

Appellant,

versus

GPR Holdings, L.L.C.; Aurora Natural Gas, L.L.C.;
Duke Energy Trading and Marketing, L.L.C.;
Golden Prairie Supply Services, L.L.C.,

Appellees.

Appeal from the United State District Court
For the Northern District of Texas

Before SMITH, BENAVIDES and PRADO, Circuit Judges.

JERRY E. SMITH, Circuit Judge:

Edge Petroleum Operating Company, Inc. ("Edge"), appeals the summary judgment entered in its conversion action against Duke Energy Trading and Marketing, L.L.C. ("Duke"). We affirm.

I.

Edge, a producer of natural gas, sold gas to GPR Holdings, L.L.C. ("GPR"), Aurora Natural Gas, L.L.C. ("Aurora"), and Golden Prairie Supply Services, L.L.C. ("GPSS") (collectively "the debtors"), through its marketing agent, Upstream Energy Services Company ("Upstream"). The gas was delivered by pipeline in May and June 2001, and the debtors were obliged by contract to pay Edge on the twenty-fifth day of the month following delivery, i.e., on June 25 and July 25. The debtors sold the gas to Duke, which resold it to third parties. In the pipeline, the gas produced by Edge was commingled with gas from other producers; the gas has since been consumed.

Edge has not been paid for the gas, nor has it filed any claim against the debtors in their respective bankruptcy cases, which were filed in August 2001. Instead, Edge sued Duke in state court, seeking to recover the amount the debtors owed for the gas and damages for conversion of Edge's security interest under the Texas Mineral Lien Act.[8] Edge and the debtors allege that Duke has not paid the debtors for the gas; Duke answers that it did pay for the gas, based on the theory that it overpaid the debtors in the

[8] *See* TEX. BUS. & COM.CODE ANN. § 9.343, formerly *id.* § 9.319 before recodification in 2002. The text of the statute and the existence of any material difference between the codifications will be discussed below.

months before May 2001 and, to offset its overpayment, accepted delivery of gas in May and June 2001.

The debtors are suing Duke for payment for the later deliveries in separate litigation.[9] Edge contends that even if Duke overpaid for the earlier gas, the fact that it offset that payment by failing to pay for Edge's gas means that it accepted Edge's gas as payment for a debt, and it thereby abrogated any possible status as a holder in due course and subjected itself to double liability in the case of conflicting determinations by state and federal courts.[10]

Shortly before a scheduled trial in state court, Duke removed to the United States District Court for the Southern District of Texas, predicating jurisdiction on the bankruptcy of Aurion Technologies, L.L.C. ("Aurion"), which was the majority shareholder of Aurora and was controlled by a common owner, Dennis McLaughlin III.[11] Duke conceded in the district court that its removal was untimely with regard to the ongoing bankruptcy cases of all the debtors other than Aurion. Edge acknowledges that removal would be timely with respect to the bankruptcy of Aurion but claims that it is not seeking to enforce a lien on the proceeds from the sale of any gas that may have passed from Edge through Aurion, so this case is not related to Aurion's bankruptcy. Unlike GPR, GPSS, and Aurora, Aurion has not intervened in the instant case.

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[9] *See GPR Holdings, L.L.C. v. Duke Energy Trading & Mktg., L.L.C.* (No. 03-3430, Bankr.N.D.Tex.).

[10] *See* TEX. BUS. & COM.CODE §§ 1.201(9), 9.320(a).

[11] Shortly before the instant suit was filed, Duke alleged in separate state court proceedings that McLaughlin had acted through Aurora, GPR, GPSS, and Aurion to defraud it by accepting payment for gas that he never intended to deliver, through a scheme that induced Duke to pay twice the agreed-upon price for each shipment: one full payment to Aurora and one full payment to one of McLaughlin's other companies.

The Southern District court ruled, in response to Edge's first motion for remand, that this matter is related to the Aurion bankruptcy proceedings and thus that removal was timely. It then transferred the case to the United States District Court for the Northern District of Texas, where Edge renewed its motion for remand (either for lack of jurisdiction or abstention), which was once again denied, this time by the bankruptcy court. Edge then consented to jurisdiction in the bankruptcy court rather than the district court.

The bankruptcy court granted the debtors' motion to intervene. The debtors asserted that they are the real party in interest to Edge's lawsuit, because Edge is seeking to enforce a lien against property owned by them in the form of accounts receivable. The bankruptcy court granted summary judgment in favor of Duke and the debtors, reasoning that, even accepting, *arguendo,* that Edge possessed a valid lien, Edge sought to enforce that lien against the debtors' accounts receivable.

Hence, the bankruptcy court held that the action was automatically stayed,[12] and it declined to grant leave from the stay. The court then ruled that Texas state law did not permit Edge to enforce its possible security interest via a conversion action against Duke. The court found a disputed issue of material fact as to whether Edge had a security interest.

Edge perceived, in the bankruptcy court's opinion, a determination that Edge did, in fact, hold a security interest in the proceeds from sale of the gas, so Edge moved for amendment of the summary judgment order to reflect such

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[12] *See* 11 U.S.C. § 362(a)(3), (4), (5) and (6) (staying, automatically upon filing of a bankruptcy petition, creditors' actions to exercise control over property of the bankruptcy estate and to collect or recover on a pre-bankruptcy petition claim).

a finding. The court explained that it had determined that Edge possessed a security interest in whatever proceeds were actually due to the first purchaser but that such determination did not imply summary judgment that Edge had any security interest in the proceeds of the sale currently in possession of Duke; the court declined to amend its order.

The district court affirmed the bankruptcy court without separate opinion. Edge now appeals only in regard to its conversion action to enforce its lien; in the summary judgment proceeding, Edge did not address the action to recover the purchase price of the gas.

II.

We first address subject matter jurisdiction, which is a question of law that we review *de novo*. *See McKnight v. Comm'r*, 7 F.3d 447, 450 (5th Cir.1993). Although Edge alleges that it seeks assets from Duke solely under state law, there is federal jurisdiction because of implications for the debtors' estates.[13]

Duke removed pursuant to 28 U.S.C. § 1452, which allows removal of claims where federal jurisdiction arises under 28 U.S.C. § 1334. Section 1334(b) provides for federal jurisdiction over proceedings "related to" cases arising under the Bankruptcy Code. We have read this jurisdictional grant broadly, stating that the test for whether a proceeding properly invokes federal "related to" jurisdiction is whether the outcome of the proceeding could conceivably affect the estate being administered in

[13] Duke asserts that Edge waived any jurisdictional objection by consenting to trial in bankruptcy court, but this argument is meritless according to the well settled doctrine that federal subject matter jurisdiction may be challenged at any time on appeal; "parties cannot waive a want of subject matter jurisdiction." *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424, 429 (5th Cir.2002)

bankruptcy. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 434 (5th Cir.2001). Certainty is unnecessary; an action is "related to" bankruptcy if the outcome could alter, positively or negatively, the debtor's rights, liabilities, options, or freedom of action or could influence the administration of the bankrupt estate. *See Feld v. Zale Corp. (In re Zale Corp.)*, 62 F.3d 746, 752 (5th Cir.1995).

The district court appears to have assumed that, if this case merely involved a claim by Edge against Duke's assets, there would be no federal jurisdiction.[14] The court determined, however, that Edge's rights extend only to a lien on "the identifiable proceeds of that production owned by, received by, or due to [the debtors]." *See* TEX. BUS. & COM.CODE ANN. § 9.343(c). Because the district court reasoned that any assets in Duke's possession on which Edge had a lien must at least be "due to [the debtors]," it ruled that this case relates to the bankruptcy estates and properly invokes federal jurisdiction.

Although, as we explain, this case involves only a claim against Duke's assets, the district court was wrong to assume that a claim by Edge solely against Duke's property does not relate to the debtors' bankruptcy proceedings. Someone owes Edge money for the gas; if it is not Duke, it is the debtors. *See id.* If it is Duke, then Duke will have discharged a liability of the debtors and, as the bankruptcy court recognized, probably will file a claim against the debtors' estates for reimbursement. Although there likely would be no change in the amount of liability claimed against the debtors, Duke and Edge presumably had different contractual arrangements with the debtors and different statutory bases for their claims.

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[14] As the bankruptcy court explained, "If Edge were only pursuing a cause of action against Duke's property, this proceeding would not be related to the Debtors' bankruptcies and there would be no basis for federal jurisdiction."

For example, Edge holds a secured gas producer's lien, but Duke does not. *See* § 9.343(a). Because of these divers contractual and statutory frameworks, the identity of the party that the debtors owe for Edge's gas is likely to affect the administration of the debtors' estates and may alter the debtors' rights and liabilities. Under the lenient test set forth above, that possibility is sufficient to confer federal jurisdiction.

III.

Edge urges that we order a remand to state court because Duke's removal was untimely. We disagree.

Duke contends, as it did with respect to subject matter jurisdiction, that Edge waived any objection to the timeliness of removal by consenting to bankruptcy court jurisdiction. Timeliness of removal is a procedural rather than a jurisdictional issue and, accordingly, may be waived by an untimely objection. *See Hartford Accident & Indem. Co. v. Costa Lines Cargo Servs., Inc.*, 903 F.2d 352, 359-60 (5th Cir.1990). Here, however, Edge's objection was timely-it came only six days after removal-and the fact that Edge was willing to have its case tried by the bankruptcy court rather than the district court after its objections to removal and the timeliness thereof were overruled does not serve to waive those objections.

Although removal was timely solely with respect to Aurion's bankruptcy petition, and Aurion bore an attenuated relationship to the parties, the test for "related to" bankruptcy jurisdiction is sufficiently broad to provide federal jurisdiction for this case by relating it solely to Aurion's bankruptcy. Because this litigation related to Aurion's bankruptcy petition, removal was timely.

In response to Edge's arguments concerning the timeliness of removal, the district court found that Aurion

was the assignee of certain of Aurora's contractual rights arising from its sale of gas to Duke. We review this finding of fact for clear error, *see Bass v. Denney (In re Bass)*, 171 F.3d 1016, 1021 (5th Cir.1999), and we decline to upset it on appeal. Even if Aurion is not subject to Aurora's liabilities (a matter about which we express no opinion), the outcome of this case could affect Aurion's recovery from Duke in the separate litigation involving Duke and the debtors. This litigation thus relates to Aurion's bankruptcy, and Duke's removal within ninety days of the order for relief stemming from Aurion's bankruptcy petition was timely. *See* FED. R. BANKR.P. 9027(a)(2)(A).

IV.

Edge argues that the district court was required by the mandatory abstention provision applicable to non-core bankruptcy proceedings to abstain from adjudicating this case. *See* 28 U.S.C. § 1334(c)(2). We review the decision not to abstain for abuse of discretion.[15] *Southmark Corp. v. Coopers & Lybrand (In re Southmark Corp.)*, 163 F.3d 925, 929 (5th Cir.1999). The court did not abuse its discretion, though our conclusion is not predicated on any argument advanced by the parties or expressly relied on by the district court in its discussion of abstention.[16]

Section 1334(c)(2) reads as follows:

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[15] Again, we stress that Edge did not waive its arguments on mandatory abstention by consenting to bankruptcy court jurisdiction. Edge waived any right it had to trial in district court rather than bankruptcy court under 28 U.S.C. § 157 but did not waive its contention that federal courts should abstain from adjudicating this case. *See FDIC v. Majestic Energy Corp. (In re Majestic Energy Corp).*, 835 F.2d 87, 90 (5th Cir.1988)

[16] We may affirm for any reason supported by the record, even if not relied on by the district court. *LLEH, Inc. v. Wichita County, Tex.*, 289 F.3d 358, 364 (5th Cir.2002).

> Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

28 U.S.C. § 1334(c)(2). We have interpreted this provision to mandate federal court abstention where "(1) [t]he claim has no independent basis for federal jurisdiction, other than § 1334(b); (2) the claim is a non-core proceeding, i.e., it is related or in a case under title 11; (3) an action has been commenced in state court; and (4) the action could be adjudicated timely in state court." *Schuster v. Mims (In re Rupp & Bowman),* 109 F.3d 237, 239 (5th Cir.1997). Section 1334(b) provides for federal jurisdiction over cases arising under or related to the bankruptcy code.

Edge's complaint gives rise to two claims: one that is a core proceeding and another that is supplemental to it and eligible for federal jurisdiction under 28 U.S.C. § 1367(a). Bankruptcy courts may not exercise supplemental jurisdiction. *See Walker v. Cadle Co. (In re Walker),* 51 F.3d 562, 570 (5th Cir.1995). Section 1334(c)(2), however, addresses abstention by district courts. Section 1367(a) provides for supplemental jurisdiction (subject to irrelevant exceptions) over claims forming part of the same case or controversy with "any civil action over which the district courts have original jurisdiction." This includes bankruptcy jurisdiction.[17] It follows that district courts have supplemental jurisdiction over claims that form part of the

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[17] *See* § 1334(a) (stating that subject to a provision for concurrent jurisdiction in the bankruptcy courts, "the district courts shall have original and exclusive jurisdiction of all cases under title 11").

same case or controversy with bankruptcy claims. *See Publicker Indus. v. United States,* 980 F.2d 110, 114-15 (2d Cir.1992).

Because neither of Edge's claims meets the criteria of the *Schuster* test, the bankruptcy and district courts were correct in refusing to abstain. When this case was removed and the district court reconsidered its jurisdiction, the court was appropriately wary of the breadth of Edge's complaint.[18] The court noted that the complaint was drafted broadly enough to provide the right to pursue a claim against the proceeds of the sale from the debtors to Duke as well as the proceeds from the sale from Duke to third parties.[19]

If Edge was not pursuing both theories, it should have sought leave to amend its complaint rather than confuse the lower courts into addressing both theories. Federal question jurisdiction must be determined from the face of a well-pleaded complaint. *See Louisville & Nashville R.R. v. Mottley,* 211 U.S. 149, 152 (1908). The district court was correct not to remand the possible claim against the proceeds of the sale from the debtors to Duke; these would have been accounts receivable by the debtors, and claims against them would be core bankruptcy proceedings not entitled to mandatory abstention.[20]

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[18] The court quoted the complaint's statement that "[t]his is an action for recovery of the value (contract price) of a volume of Texas gas, or proceeds thereof that Edge as the producer sold, but for which it has not been paid."

[19] *See Cohen v. Rains,* 769 S.W.2d 380, 384-85 (Tex.App.-Fort Worth 1989, writ denied) ("[W]hen a debtor is in default a secured party is not required to elect which of these rights he wishes to pursue-he may take any permitted action or combination of actions.").

[20] *See* 28 U.S.C. § 157(b)(E) (defining "orders to turn over property of the estate" as within "core" federal bankruptcy jurisdiction); *Schuster,* 109 F.3d at 239 (stating that core matters fail prong two of the test

Edge also was not entitled to abstention on its claim against the proceeds of Duke's sale to third parties, because mandatory abstention applies solely to claims giving rise to federal jurisdiction under no provision other than § 1334. Edge's claim against the proceeds from Duke's sale to third parties does not meet that requirement, because it arises from "a common nucleus of operative fact" with the claim against the debtors' accounts receivable and is thus a supplemental claim giving rise to jurisdiction under § 1367(a).[21]

The fact that Edge ultimately waived the merits of its federal-question claim and pressed only its supplemental claim did not affect the propriety of abstention *vel non,* because Edge's loss on the merits of its federal question claim did not operate to defeat the district court's independent basis for jurisdiction over the supplemental claim.[22] In sum, the complaint gave rise to two claims; because Edge's non-core claim was supplemental to the core claim it could have pressed, and because § 1367(a) continued to provide an independent basis for federal jurisdiction even after Edge had waived the merits of its core bankruptcy claim, abstention was inappropriate.

V.

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recounted above); *Southmark,* 163 F.3d at 932 (explaining that matters within core bankruptcy jurisdiction are subject to discretionary rather than mandatory abstention). As Edge acknowledges, the district court's refusal to abstain as a matter of discretion pursuant to § 1334(c)(1) is unreviewable on appeal. *See* § 1334(d).

[21] *See United Mine Workers v. Gibbs,* 383 U.S. 715, 725 (1966); *Schuster,* 109 F.3d at 239.

[22] *See* § 1367(c) (providing for discretionary abstention rather than lack of jurisdiction over supplemental claims where the claim giving rise to original jurisdiction (federal question, diversity or admiralty) has been dismissed on the merits).

Edge contests the bankruptcy court's ruling that this action was automatically stayed under 11 U.S.C. § 362(a). We review the court's interpretation of the statute *de novo*. *Southmark*, 163 F.3d at 929. Section 362(a) operates to stay only actions against bankruptcy petitioners and their property. Because Edge's claim for conversion against Duke lies against a non-debtor and does not implicate the property of the debtors, the bankruptcy court erred by staying it.

Section 362(a) recounts a long list of actions that are stayed by the filing of a bankruptcy petition. The provision does not apply, however, to actions not directed against the debtor or property of the debtor. *See Arnold v. Garlock, Inc.*, 278 F.3d 426, 436 (5th Cir.2001). The bankruptcy court determined that, should the proceeding between Duke and the debtors result in a finding that Duke had not paid the debtors for the gas, Edge's claim would be against accounts receivable by the debtors and thus would be stayed as an action against the debtors' property.

The court misinterpreted Edge's claim. Edge argues that Duke is liable to it independently of whether Duke has paid the debtors, because (1) § 9.343 provides a lien that follows the gas or proceeds from sale thereof until cut off by a sale in the ordinary course of business or payment to the lienholder; (2) Edge has not been paid for the gas; and (3) Duke did not cut off Edge's lien by transacting in the ordinary course of business.

Under this theory, Edge's rights hinge on whether the manner in which Duke transacted with the debtors immunized Duke, as a holder in due course, from liability to Edge. Though relevant, the factual matter at issue in the debtors' suit against Duke-whether Duke paid for the gas-is not dispositive of the holder-in-due-course issue. Edge contends that § 9.343 imposes liability on Duke even if it paid the debtors but did not do so in the ordinary course of

business and did not comply with the statutory safe harbors. Edge's claim thus lies against the proceeds of Duke's sale of the gas to third parties (the sale that, according to Edge, cut off its lien on the gas) rather than against any accounts receivable by the debtors.

It is true, as noted above in the discussion of subject matter jurisdiction, that a successful claim by Edge against Duke would probably result in a lawsuit by Duke against the debtors seeking indemnification for Duke's payment of the debtors' debt to Edge. Edge, however, has framed its claim so that the merits of that probable litigation are not Edge's problem. Regardless of whether Edge's reading of Texas law is correct, its claim is not directed against the debtors' property and is not subject to a stay under § 362(a).

VI.

A.

We agree with the district court that Edge has demonstrated that there is a disputed issue of material fact as to whether it has a gas producer's lien on the proceeds of Duke's sale of the gas, but that Edge may not recover from Duke *via* an action for conversion. Because the viability of a conversion action depends critically on the nature of the property allegedly converted, we address whether Edge arguably has a lien at all.

The issue of whether Edge has a gas producer's lien on the proceeds of Duke's sale of the gas raises two subsidiary questions: (1) Does Texas law, under any circumstances, provide Edge with a lien that could be enforced against the proceeds of a sale of its gas to a third party by a downstream purchaser such as Duke; and (2) assuming Texas law provides for a lien against a downstream purchaser, do the facts of this case arguably support the conclusion that Edge has one against Duke? *See Anderson*

v. Liberty Lobby Inc., 477 U.S. 242, 248-49 (1986). We discuss only whether Texas law allows for a producer's lien on gas or the proceeds from resale thereof that is enforceable against a downstream purchaser such as Duke. We do not consider whether a lien was created in Edge, because we conclude that, on the facts before us, the legal nature of the lien renders it unenforceable *via* an action for conversion.

B.

Section 9.343 is the successor of a nonuniform addition to Texas's commercial code designed to provide security protection for royalty owners and producers when first purchasers go bankrupt.[23] The statute reads in relevant part as follows:

(a) This section provides a security interest in favor of interest owners, as secured parties, to secure the obligations of the first purchaser of oil and gas production, as debtor, to pay the purchase price. An authenticated record giving the interest owner a right under real property law operates as a security agreement created under this chapter. The act of the first purchaser in signing an agreement to purchase oil or gas production, in issuing a division order, or in making any other voluntary communication to the interest owner or any governmental agency recognizing the interest owner's right operates as an authentication of a security agreement

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[23] *See* Cynthia G. Grinstead, Note, *The Effect of Texas U.C.C. Section 9.319 on Oil and Gas Secured Transactions*, 63 TEX. L. REV. 311, 311 (1984). Duke alleges that the prior codification of these sections governed at the time of the transactions at issue and that the prior codification differs in material respects. Duke concedes, however, that the former § 9.319 is identical to § 9.343; it argues instead that other referenced sections are critically different. Like the parties and courts *a quo*, we refer to the current codification and mention any changes where relevant.

in accordance with Section 9.203(b) for purposes of this chapter.

(b) The security interest provided by this section is perfected automatically without the filing of a financing statement ....

(c) The security interest exists in oil and gas production, and also in the identifiable proceeds of that production owned by, received by, or due to the first purchaser:

(1) for an unlimited time if:

(A) the proceeds are oil or gas production, inventory of raw, refined, or manufactured oil or gas production, or rights to or products of any of those, although the sale of those proceeds by a first purchaser to a buyer in the ordinary course of business as provided in Subsection (e) cuts off the security interest in those proceeds;

(B) proceeds are accounts, chattel paper, instruments, documents, or payment intangibles; or

(C) the proceeds are cash proceeds, as defined in Section 9.102; and

(2) for the length of time provided in Section 9.315 for all other proceeds.

(d) This section creates ... a lien that secures the rights of any person who would be entitled to a security interest under Subsection (a) except for lack of any adoption of a security agreement by the first purchaser or a lack of possession or record required by Section 9.203 for the security interest to be enforceable.

(e) The security interests and liens created by this section have priority over any purchaser who is not a buyer in the ordinary course of the first purchaser's business, but are cut off by the sale to a buyer from the first purchaser who is in the ordinary course of the first purchaser's business under Section 9.320(a). But in either case, whether or not the buyer from the first purchaser is in ordinary course, a security interest will continue in the proceeds of the sale by the first purchaser as provided in Subsection (c)....

(l) A first purchaser who acts in good faith may terminate an interest owner's security interest or statutory lien under this section by paying, or by making and keeping open a tender of, the amount the first purchaser believes to be due to the interest owner:

> (1) if the interest owner's rights are to oil or gas production or its proceeds, either to the operator alone, in which event the operator is considered the first purchaser, or to some combination of the interest owner and the operator, as the first purchaser chooses;
>
> (2) whatever the nature of the production to which the interest owner has rights, to the person that the interest owner agreed to or acquiesced in; or
>
> (3) to a court of competent jurisdiction in the event of litigation or bankruptcy.

(m) A person who buys from a first purchaser can ensure that the person buys free and clear of an interest owner's security interest or statutory lien under this section:

(1) by buying in the ordinary course of the first purchaser's business from the first purchaser under Section 9.320(a);

(2) by obtaining the interest owner's consent to the sale under Section 9.315(a)(1);

(3) by ensuring that the first purchaser has paid the interest owner or, provided that gas production is involved, or the interest owner has so agreed or acquiesced, by ensuring that the first purchaser has paid the interest owner's operator; or

(4) by ensuring that the person or the first purchaser or some other person has withheld funds sufficient to pay amounts in dispute and has maintained a tender of those funds to whoever shows himself or herself to be the person entitled.

TEX. BUS. & COM.CODE ANN. § 9.343.

The commentary to § 9.320(a), which is referenced by § 9.343(m) quoted above, explains that its definition of "buyer in the ordinary course of business" derives from TEX. BUS. & COM.CODE § 1.201(9). *See* § 9.320, cmt. 3. Section 1.201(9)(b), in turn, defines "buyer in the ordinary course of business":

> [A] person that buys goods in good faith, without knowledge that the sale violates the rights of another person, other than a pawnbroker, in the business of selling goods of that kind. *A person buys in the ordinary course if the sale to the person comports with the usual or customary practices of the kind of business in which the seller is engaged or with the seller's own usual or customary practices.* A person that sells oil, gas, or minerals at the wellhead or minehead is a person in the business of selling goods of that kind .... Only a

> buyer that takes possession of the goods or has a right to recover the goods from the seller under Chapter 2 may be a buyer in the ordinary course of business. *"Buyer in the ordinary course of business" does not include a person that acquires goods in a transfer in bulk or as security for or in total or partial satisfaction of a money debt.* (Emphasis added.)

Edge's claim may be summarized as follows: (1) that it had an interest in the gas created by subsection (a); (2) that the interest was not defeated by any notification requirement in light of the minimal nature of the requirements established by subsections (b) and (d); (3) that the interest followed the gas and thus attached to the proceeds of the sale to third parties pursuant to subsection (c); and thus (4) the interest was not limited to the proceeds of the sale by the debtors to Duke as provided in subsection (e), because (5) the debtors did not cut off Edge's lien by taking any of the actions specified in subsection (1); and (6) Duke did not cut off Edge's lien by taking any of the actions specified in subsection (m). Edge asserts that it has three sources of collateral: (1) the gas that Edge sold to the debtors and the debtors sold to Duke; (2) the debtors' accounts receivable after the sale of the gas to Duke; and (3) the cash proceeds that Duke received from the sale of the gas to the third parties.[24] The gas is now gone, but Edge asserts that it may recover for conversion of either the gas or the proceeds from Duke's sale thereof.[25]

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[24] *See* TEX. BUS. & COM.CODE ANN. § 9.315(a)(2) (providing for the continuation of a security interest in the proceeds of the sale of secured collateral).

[25] Edge also claims that it could recover from the proceeds, in the form of accounts receivable by the debtors from Duke, from the sale by the debtors to Duke of the gas. As we have said, Edge has not pressed this claim, so it is not addressed here.

According to Duke, Edge's suit is barred because (1) any claim brought by Edge against Duke under the statute actually belongs to the debtors; or (2) the claim seeks to recover the property of the debtors' estates.[26] Duke alleges that Edge lacks standing, as a matter of law, to bring a claim against it under the statute, because subsection (c), quoted above, states that the lien inheres in "proceeds of that production owned by, received by, or due to the first purchaser." § 9.343(c). Duke reasons that because Edge alleges that Duke holds proceeds due to the debtors, it is asserting a harm to the debtors rather than to itself and has no standing to bring its claim.

We disagree. Edge does not assert harm to the debtors by alleging that Duke converted its security interest by selling the gas free and clear to a third party. Because the security interest was Edge's property, provided by § 9.343(a), Edge asserts harm only to itself, and because only Edge, as a gas producer, enjoys the statutory protection of § 9.343, only Edge has standing to assert a conversion claim with respect to that interest.[27]

"Whether a particular state cause of action belongs to the [debtor's] estate depends on whether under applicable state law the debtor could have raised the claim as of the commencement of the case." *Schertz-Cibolo-Universal City Indep. Sch. Dist. v. Wright (In re Educators Group Health Trust)*, 25 F.3d 1281, 1284 (5th Cir.1994). Only Edge could assert a producer's lien against the proceeds from sale of the gas; neither the debtors nor any other plaintiff had one. Edge does not and need not assert that

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[26] *See Adacom Corp. v. Byrne (In re Schimmelpenninck)*, 183 F.3d 347, 350-51 (5th Cir.1999); *S.I. Acquisition, Inc. v. Eastway Delivery Serv., Inc. (In re S.I. Acquisition, Inc.)*, 817 F.2d 1142, 1150 (5th Cir.1987).

[27] *See Lively v. Carpet Servs., Inc.*, 904 S.W.2d 868, 874 (Tex.App.-Houston [1st Dist.] 1995, writ denied) (reasoning that where statute granted property right to creditor rather than bankrupt debtor, that right was enforceable by creditor against non-bankrupt defendant).

Duke converted or otherwise improperly acquired the debtors' property. Instead, it must and does assert only that Duke acquired the property outside the ordinary course of business (for example by accepting it in return for a debt) and thus acquired it subject to a lien. *See* § 1.201(b)(9). When Edge accuses Duke of converting that lien, it asserts that Duke improperly exercised dominion over its property, and it presses a claim that it has standing to bring.[28]

Duke contends that this interpretation of the statute effectively creates strict liability for, and a live claim against, a stream of distant, downstream purchasers. Duke points out that gas traders frequently have few assets other than their accounts receivable and contends that the statute was passed to protect producers against secured creditors of bankrupt traders that provided working capital for the trades and seized all assets upon bankruptcy or failure of the trading company. *See* Grinstead, *supra,* 63 TEX. L. REV. at 311. Our interpretation, however, reads the statute to protect against a conceptually similar problem: self-help remedies by downstream creditors such as Duke who seize all the assets of a trading company and leave nothing left with which the bankrupt trader can repay the producer. Duke supplies no alternative explanation of the debt-collection exception to the holder-in-due-course rule, and the academic commentary that it cites is concerned mainly with whether the interest in proceeds supplied by subsection (c) is continuously perfected, not with whether a producer's lien on the gas may be enforced against a downstream purchaser.

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[28] *See Russell v. Am. Real Estate Corp.*, 89 S.W.3d 204, 210 (Tex.App.-Corpus Christi 2002, no pet.) (definition of conversion); *Schertz-Cibolo-Universal City,* 25 F.3d at 1284 (stating that creditor has standing to assert claim against non-bankrupt debtor for injury to itself caused by the non-bankrupt debtor).

Duke protests that, even if § 9.343(c) provided Edge with a lien on the gas, that lien did not transfer to the proceeds from Duke's resale of the gas under TEX. BUS. & COM.CODE ANN. § 9.315(a)(2), which provides for a security interest in the sale of secured property. Duke asserts that § 9.315 must be read in conjunction with § 9.343(c) and emphasizes that § 9.315(a) provides that a security interest shall attach to proceeds of sale of property in which a creditor has a security interest only "except as otherwise provided in this chapter ...." Duke then urges that § 9.343(c) limits liens on proceeds from sale of the gas to proceeds due to the first purchaser. We, however, see no inconsistency among the provisions.

Section 9.343(c)'s provision of a lien upon proceeds due to the first purchaser is an addition to, rather than a limitation on, the lien on the gas. The fact that § 9.343(c) creates two liens-one on the gas and one on the proceeds due to the first purchaser from its sale-does not mean that the second lien operates to limit the recourse that may be had under the first. Section 9.343(c) provides that a gas producer may pursue recourse on its lien on the gas or the proceeds due the first purchaser, and § 9.315 provides that, should the producer pursue its lien on the gas, it also has a lien on the proceeds from resale of the gas by a downstream purchaser who resells the gas and whose purchase did not cut off the lien. Edge thus arguably (depending on the facts) possessed a lien on the gas and the proceeds from Duke's resale thereof.

VII.

Edge, however, cannot recover its alleged security interest through an action for conversion against Duke. To show conversion, Edge must prove that Duke improperly exercised dominion over its security interest in the gas or the money (the proceeds of Duke's resale of the gas). Unfortunately for Edge, it cannot prove that Duke behaved

improperly by reselling the gas, and an action for conversion of money is available only in limited circumstances that are not present here.

A.

Edge contends, without merit, that Duke converted its interest in the gas by reselling it free and clear of Edge's security interest. To establish conversion, Edge must prove that (1) it owned or had a right to possession of the property; (2) the defendant assumed and exercised dominion and control over the property inconsistent with plaintiff's rights; and (3) the defendant refused plaintiff's demand for return of the property. *See Russell,* 89 S.W.3d at 210. At the time Duke exercised dominion over the gas, payment for the gas had not yet come due, and Edge had no right to enforce its interest in the gas. *See ITT Commercial Fin. Corp. v. Bank of the West,* 166 F.3d 295, 305 n. 16 (5th Cir.1999). Edge, however, contends that Duke's reselling the gas in the ordinary course of business, free of the encumbrance of Edge's security interest, constituted conversion. Edge further alleges that this repudiation of Edge's rights was so blatant and egregious as to foreclose any need for Edge to have demanded return of its property. We disagree.

It is true that Texas law recognizes some circumstances in which the repudiation of property rights is so blatant as to excuse the need for a demand in order to maintain an action for conversion. *See Loomis v. Sharp,* 519 S.W.2d 955, 958 (Tex.App.-Texarkana 1975, writ denied). This is not one of them. Damningly, Edge does not cite a single case in which a party has recovered on a security interest supplied by § 9.343 in an action for conversion against a first purchaser, much less a downstream possessor such as Duke. The bankruptcy court found that Edge's sale to the debtors, consistent with prevailing practices in the gas industry, constituted implied consent to resale of the gas,

before the due date of the payment, to downstream purchasers in the ordinary course of business. There is no reason to upset that finding on appeal.

Edge mounts two responses. First, it argues that implied consent is not sufficient to defeat a security interest holder's rights.[29] Second, it contends that, even if it did impliedly consent to resale of the gas, it did not impliedly consent to resale free and clear of its security interest. Although we acknowledge that rhetorical cannonballs can be hurled on both sides,[30] the bankruptcy court's analysis of Edge's expectations, in light of the prevailing practices in the oil and gas industry, is persuasive. And if Edge consented to resale of the gas in the ordinary course of business, its argument that it did not consent to the cutting off of its security interest at some point downstream is without merit, because that cutting off of the upstream security interest is a direct consequence of such sales. *See* § 9.343(e).

In any event, it is difficult to see how Duke's actions could be so egregiously violative of Edge's rights as to foreclose the need for a demand, which Edge has not made. Duke resold the gas before payment under a contract to which it was not privy came due. Conversion generally takes place only after refusal of a demand for return of the property, and only extraordinary circumstances excuse the need for a demand. *See Permian Petroleum Co. v.*

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[29] *See Conoco Inc. v. Amarillo Nat'l Bank*, 950 S.W.2d 790, 796 (Tex.App.-Amarillo 1997) ("To establish that a secured party consented to a transfer of collateral and thereby waived his secured claim by implication there must be a clear, unequivocal, and decisive act of the party showing such a purpose or acts amounting to estoppel on his part."), *rev'd on other grounds*, 996 S.W.2d 853 (Tex.1999).

[30] *See, e.g., Pan Eastern Exploration Co. v. Hufo Oils*, 855 F.2d 1106, 1125 (5th Cir.1988) (explaining that the defendant's taking "must be wholly without the owner's sanction or assent, either expressly or impliedly").

Petroleos Mexicanos, 934 F.2d 635, 651 (5th Cir.1991). Duke, which never even had notice of Edge's rights, could hardly be said to have used the property so inconsistently with the manner in which it was received as to assert a property right inconsistent with that of the owner. *See Pierson v. GFH Fin. Servs. Corp.,* 829 S.W.2d 311, 314 (Tex.App.-Austin 1992, no writ). Because Edge's implied consent to resale and failure to demand return of its security interest in the gas defeat its claim for conversion of the gas, we do not address Duke's alternative argument that it did not convert the gas because, on account of the gas's physical presence in the pipeline, Duke never possessed it.

B.

As with its interest in the gas, Edge may not recover on its interest in the proceeds from Duke's sale of the gas through an action for conversion. Actions for conversion of money are available in Texas only where "money is (1) delivered for safekeeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper." *Edlund v. Bounds,* 842 S.W.2d 719, 727 (Tex.App.-Dallas 1992, writ denied).

Edge's argument that Duke, upon resale of the gas, was in the position of a trustee-holding Edge's money pending payment by the debtors-is somewhat feeble. This case is similar to *Mitchell Energy Corp. v. Samson Res. Co.,* 80 F.3d 976, 983-84 (5th Cir.1996), in which we ruled that a cotenant on a mineral estate could not maintain an action for conversion of money where its cotenant had withdrawn gas from the ground, sold the gas, and refused to turn over the proper share of the proceeds. The bankruptcy court was correct to recognize that a party that benefits from proceeds subject to a statutory lien may be liable for conversion of such proceeds only if it has notice of the lien, then accepts and benefits from the proceeds. *See Home Indem. Co. v.*

Pate, 814 S.W.2d 497, 498-99 (Tex.App.-Houston [1st Dist.] 1991, writ denied).

The bankruptcy court found that Edge had put forth no summary judgment evidence indicating that Duke had notice that Edge held the lien and that Edge had not been paid by the debtors. Edge does not challenge that conclusion but alleges that Duke's knowledge of § 9.343 was enough notice to put it in the shoes of a trustee. Duke's notice, however, was not even close to those in Texas cases in which trustees have improperly disposed of assets.[31] Duke knew or may be presumed to have known the law, but did not know that Edge was owed the money. Without more, Edge cannot overcome Texas courts' traditional hostility to claims for conversion of money.

Edge alleges that our construction of the statute renders its rights nugatory. Our interpretation, however, does not foreclose creditors such as Edge from pursuing actions for collection; creditors are cut off only from actions for conversion with the attendant possibility of punitive damages against downstream property holders without notice of the producer's claims or the failure of the first purchaser to fulfill its contractual obligations. This is a reasonable construction of the statute and best approximates the legislative intent.

The judgment of the district court, affirming the bankruptcy court, is AFFIRMED.

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[31] *See Prewitt & Sampson v. City of Dallas,* 713 S.W.2d 720, 722 (Tex.App.-Dallas 1986, no writ) (in which attorney improperly disbursed funds he knew to be due to insurance carrier).

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

EDGE PETROLEUM OPERATING CO.,	§	
	§	
Appellant,	§	
	§	
v.	§	Civil Action No.
	§	3:04-CV-1873-N
	§	
GRP HOLDINGS, L.L.P., *et al.*,	§	
	§	
Appellees.	§	

ORDER ON APPEAL

Before the Court are the appeals of Edge Petroleum Operating Company and Bayerische Hypo-Und Vereinsbank Aktiengesellschaft, New York Branch (formerly Civil Action No. 3:04-CV-2610-N, now consolidated into this cause number). Upon review of the judgments and other orders of the Bankruptcy Court below, the record, and the briefing of the parties, the Court holds that the judgments below should be and hereby are AFFIRMED for the reasons stated by the Bankruptcy Court in its various orders.

Signed August 4, 2005.

/s/ David C. Godbey
David C. Godbey
United States District Judge

The following constitutes the order of the Court.

Signed July 8, 2004. /s/ Steven A. Felsenthal
United States Bankruptcy Judge

IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

IN RE:	§	
	§	
AURORA NATURAL GAS, L.L.C.	§	CASE NO. 01-36709-SAF-7
	§	
ANG HOLDINGS, L.L.C.	§	CASE NO. 01-36900-SAF-11
	§	
GPR HOLDINGS, L.L.C.	§	CASE NO. 01-36736-SAF-11
	§	
GOLDEN PRAIRIE SUPPLY SERVICES, L.L.C.	§	CASE NO. 01-36904-SAF-7
	§	
DEBTOR (S)	§	
	§	
EDGE PETROLEUM OPERATING CO., INC.,	§	
PLAINTIFF,	§	
vs.	§	ADVERSARY NO. 03-3564
DUKE ENERGY TRADING AND MARKETING, L.L.C.,	§	
DEFENDANT	§	

MEMORANDUM OPINION AND ORDER

The parties request that the court resolve this litigation on summary judgment. Edge Petroleum Operating Co., Inc., the plaintiff, has not been paid for natural gas sold to Aurora Natural Gas, LLC (Aurora), Golden Prairie Supply Services, LLC (Golden Prairie) and/or GPR Holdings, LLC (GPR), the intervenors/debtors, who, in turn, sold the natural gas to Duke Energy Trading and Marketing, LLC (Duke), the defendant, who, in turn, sold the natural gas to third persons. Edge moves for summary judgment holding Duke liable for the payment of the gas and for conversion of Edge's interest in the gas under § 9.343 of the Tex. Bus. & Com. Code. Duke moves for summary judgment declaring that it has no liability to Edge. Golden Prairie, Aurora and GPR move for summary judgment contending, like Duke, that Edge did not have a security interest in the gas and that Edge cannot prove the elements of conversion. GPR, Aurora and Golden Prairie are debtors in bankruptcy cases pending before this court. They contend that Edge must pursue its claim for payment for the gas in their respective bankruptcy cases. The court conducted a hearing on the motions for summary judgment on April 7, 2004.

Summary judgment is proper if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, and other matters presented to the court show that there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Celotex Corp. v. Catrett, 477 U.S. 317r 322-23 (1986); Anderson v. Liberty Lobby, Inc., 477 U.S. 242r 250 (1986); Washington v. Armstrong World Indus., Inc., 839 F.2d 1121, 1122 (5th Cir. 1988). On a summary judgment motion, the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion. Anderson, 477 U.S. at 255. A factual dispute bars summary judgment only when the disputed fact is determinative under

governing law. Id. at 250.

The movant bears the initial burden of articulating the basis for its motion and identifying evidence which shows that there is no genuine issue of material fact. Celotex, 477 U.S. at 322. The respondent may not rest on the mere allegations or denials in its pleadings but must set forth specific facts showing that there is a genuine issue for trial. Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp., 475 U.S. 574, 586-87 (1986). The court applies the same standards to all three motions for summary judgment.

For summary judgment purposes, there is no genuine issue of material fact concerning the following. Edge produces natural gas. In May and June 2001, Edge sold natural gas to Aurora, Golden Prairie or GPR, the debtors, through its marketing agent, Upstream Energy Services Company. Under the parties' contractual arrangement, the debtors had an obligation to pay for the gas on the 25th day of the month following delivery. The debtors would pay for gas delivered in May by June 25, 2001, and for gas delivered in June by July 25, 2001.

Upon delivery of the gas, the debtors immediately commingled the gas in the pipeline with other gas from other suppliers. The debtors immediately resold the gas purchased from Upstream to Duke.

The debtors assert that Duke did not pay the debtors for the gas. In late May 2001, Duke claimed that it overpaid the debtor for previous deliveries of gas from the debtors to Duke. Duke continued to trade with and purchase gas from the debtors. To recover the alleged overpayments, Duke credited portions of the purchases and deliveries of gas from the debtors against the pre-existing receivable. In separate litigation against Duke, GPR, Golden Prairie, and Robert Newhouse, the trustee for Aurora, seek to recover the accounts receivable and to avoid the credits under 11

D.S.C. § 547. GPR Holdings, LLC v. Duke Energy Trading and Marketing, LLC, adversary number 03-3430 (Bankr. N.D. Tex.).

Duke immediately sold the gas purchased from the debtors in May and June 2001 to other purchasers. The gas in question has been used and no longer exists. Edge has not been paid for the gas. Edge has not filed a claim against the debtors in their respective bankruptcy cases. Aurora filed its bankruptcy petition on August 13, 2001; ANG Holdings, LLC, filed its bankruptcy petition on August 20, 2001; GPR filed its bankruptcy petition on August 14, 2001; Golden Prairie filed its bankruptcy petition on August 20, 2001.

Motion to Strike

Duke filed a motion to strike summary judgment evidence submitted by Edge with its reply to Duke's and the debtors' responses to Edge's motion for summary judgment. Duke reports that the debtors join in the motion to strike. Edge submitted the additional summary judgment evidence because it understood that Duke, in its summary judgment arguments, raised the issue of whether Edge was an interest owner. The additional summary judgment evidence addresses that issue. Duke states that the evidence had not been produced in discovery. Edge responds that Duke had not previously challenged or even questioned Edge's status as an interest owner and that the evidence was in Edge's files available for Duke's inspection.

The court's review of the record does not reflect that the debtors or Duke have contested that Edge is an interest owner. Frankly, the court questions why the issue has not been submitted on stipulation. If Duke had a good faith challenge to Edge's interest owner status, Duke surely would have raised the issue by appropriate motion in the

two years the litigation has been pending before it had been transferred to this court. There is no genuine issue of material fact that Edge is an interest owner. The additional summary judgment evidence need not have been filed; yet Duke's motion to strike misses the issue. If Duke now contests what had been a non-issue, the court will consider Edge's summary judgment evidence. The court will deny Duke's motion to strike.

The Statute

Section 9.343 of the Texas Business and Commerce Code provides:

> (a) ...a security interest in favor of interest owners, as secured parties, to secure the obligations of the first purchaser of oil and gas production, as debtor, to pay the purchase price. An authenticated record giving the interest owner a right under real property law operates as a security agreement created under this chapter. The act of the first purchaser in signing an agreement to purchase oil or gas production, in issuing a division order, or in making any other voluntary communication to the interest owner or any governmental agency recognizing the interest owner's right operates as an authentication of a security agreement in accordance with Section 9.203(b) for purposes of this chapter.
>
> (b) The security interest provided by this section is perfected automatically without the filing of a financing statement.
>
> (c) The security interest exists in oil and gas production, and also in the identifiable proceeds of that production owned by, received by, or due to the first purchaser:
>
> (1) for an unlimited time if:
>
> (A) the proceeds are oil or gas production, inventory of raw, refined, or manufactured oil or

gas production, or rights to or products of any of those, although the sale of those proceeds by a first purchaser to a buyer in the ordinary course of business as provided in Subsection (e) cuts off the security interest in those proceeds;

(B) the proceeds are accounts, chattel paper, instruments, documents, or payment intangibles; or

(C) the proceeds are cash proceeds, as defined in Section 9.102; and

(2) for the length of time provided in Section 9.315 for all other proceeds.

(d) This section creates . . . a lien that secures the rights of any person who would be entitled to a security interest under Subsection (a) except for lack of any adoption of a security agreement by the first purchaser or a lack of possession or record required by Section 9.203 for the security interest to be enforceable.

Tex. Bus. & Com. Code § 9.343 (2002).

As for secondary purchasers, the statute provides:

(m) A person who buys from a first purchaser can ensure that the person buys free and clear of an interest owner's security interest or statutory lien under this section:

(1) by buying in the ordinary course of the first purchaser's business from the first purchaser under Section 9.320(a);

(2) by obtaining the interest owner's consent to the sale under Section 9.315 (a) (1);

(3) by ensuring that the first purchaser has paid the interest owner or, provided that gas production is involved, or the interest owner has so agreed or acquiesced, by ensuring that the first purchaser has paid the interest owner's operator; or

> (4) by ensuring that the person or the first purchaser or some other person has withheld funds sufficient to pay amounts in dispute and has maintained a tender of those funds to whoever shows himself or herself to be the person entitled.

Tex. Bus. & Com. Code § 9.343 (m) (2002).

Edge's Security Interest

Edge contends that under this statute it has an automatically perfected security interest in the gas sold to the debtors and in the identifiable proceeds of that gas due to the debtors by Duke. There is no genuine issue of material fact that Edge produced the gas sold under a contract to the debtors. There is also no genuine issue of material fact that Edge held a recorded real property interest in the mineral estate from which Edge produced the gas. There is no genuine issue of material fact that for all the subject gas sales in this litigation, one of the debtors was the first purchaser as defined by § 9.343(r) (3) of the Texas Business and Commerce Code, which provides, in part, that a first purchaser is:

> the first person that purchases oil or gas production from an operator or interest owner after the production is severed, or an operator that receives production proceeds from a third-party purchaser who acts in good faith under a division order or other agreement authenticated by the operator under which the operator collects proceeds of production on behalf of other interest owners.

Tex. Bus. & Comm. Code § 9. 343 (r)(3).

Duke and the debtors contend that the debtors, as first purchasers of the gas, did not sign an agreement to

purchase gas, issue a division order or make any other voluntary communication to the interest owner recognizing the interest owner's right. Aurora and Upstream entered a standard Gas Industry Standards Board ("GISB") base contract. The debtors ordered gas deliveries from Upstream on GISB transaction confirmation forms. Neither the base contract nor the confirmation forms mention Edge. But they unmistakably contain "an agreement to purchase...gas production." Tex. Bus. & Com. Code § 9.343(a).

Recently, the court in the case of In re Enron, 302 B.R. 455, 461-62 (Bankr. S.D.N.Y. 2003) held that the base contracts and confirmation forms do not constitute voluntary communications to an interest owner recognizing the interest owner's right. Edge contends that the Enron court erred in its approach to the Texas protection of gas producers and interest owners. This court does not address that issue.

Section 9.343(a) provides three alternative methods for the first purchaser to trigger the security agreement authentication. The Enron court addressed the third alternative. The second alternative, issuing a division order, does not apply in this case. But there is no genuine issue of material fact that the first alternative exists, namely, a signed agreement to purchase gas production.

The base contract is a signed agreement wherein one of the debtors agrees to purchase gas from Upstream. The base contract and the resulting spot confirmation forms do not mention Edge. The base contract does not state that Upstream is Edge's marketing agent, nor does it state that an interest owner is involved. The debtors and Duke argue, as a result, that the contract and confirmation forms do not meet the Enron test. The debtors and Duke further argue that under the Enron rationale a signed agreement for the purchase of gas must recognize the interest owner's rights.

Section 9.343(a) does not, however, require that a signed agreement to purchase gas production contain a statement recognizing the interest owner's rights. Rather, the statute requires a signed agreement to purchase gas production or any other voluntary communication to the interest owner recognizing the interest owner's right.

Edge, Duke and the debtors were, and Edge and Duke, at least, remain, players in the Texas natural gas business. None of the parties have presented summary judgment evidence suggesting that the base contract with confirmation forms does not implicitly communicate an acknowledgment of the purchase of gas with an interest owner involved in the chain of production and delivery. None of the parties actually argue that there is a fact issue here warranting submission to a jury. Section 9.343 contemplates that players in the Texas natural gas business will understand the relationships in contracts to purchase gas. "People in the business of dealing with operators and 'first purchasers' are substantially aware that royalty owners and the like always exist and have a claim to the production . . . Their identities can be discovered through the realty records in most cases." Tex. Bus. & Com. Code § 9.343 official cmt. at ¶ 5 (2002).

The court has no basis to assume that entities such as Edge or Duke would operate in the Texas gas market if the base contract and subsequent confirmation forms did not meet the statutory requirements to protect the interest owners.

The court therefore finds that Edge obtained a perfected security interest in the gas sold through its agent Upstream to the debtors in May and June 2001.

The security interest attaches to the proceeds of the debtors' sale of the gas to Duke. Section 9.343(c) provides

that the security interest exists in the gas production and in the identifiable proceeds of that production owned by, received by, or due to the first purchaser. The debtors sold the gas purchased from Upstream, as Edge's agent, to Duke. The security interest attached to the proceeds due from Duke to the debtors for that gas. As the State Bar Committee Official Comment recognizes, "[n]o unfair surprise will result if [the royalty owners'] claim also extends to proceeds." Tex. Bus. & Com. Code § 9.343 official cmt. at ¶ 5.

Duke Payment

Duke contends that it paid for the gas. There are however genuine issues of material fact concerning Duke's contention that it has paid the debtors for the gas. Duke asserts that the debtors had over billed Duke for prior gas purchases. Duke nevertheless continued to purchase gas from the debtors. Duke credited portions of the gas shipments from the debtors to pre-existing receivables. Duke took gas without paying for it as an extra-contractual remedy to reduce the alleged overpayments. Newhouse, the trustee for Aurora, GPR and Golden Prairie have filed an adversary proceeding to collect the receivable from Duke or to avoid the offset transfers. See GPR Holdings, LLC v. Duke Energy Trading and Marketing, LLC, adversary number 03-3430 (Bankr. N.D. Tex.).

If Duke prevails in the adversary proceeding, then Duke will have paid for the gas, and Edge's security interest will have attached to the payments received by the debtors. Duke would not owe the debtors for the gas purchased by the debtors from Edge and sold to Duke. Edge's lien extends to identifiable proceeds of the gas production owned by, received by or due to the first purchaser, the debtors. As Duke would not owe the debtors for the gas, having paid for it, Edge's security interest or statutory lien

would not extend to proceeds held by Duke. Edge's security interest and statutory lien would extend to the proceeds received by the debtors for the sale of the gas produced by Edge. Edge's remedy would be to pursue its secured claims in the bankruptcy cases.

As discussed below, even if it does not have a security interest or statutory lien on proceeds obtained by Duke for the sale of the gas, Edge contends that it has a separate claim of conversion against Duke. Edge argues that it may pursue its conversion claim whether or not it files a claim in the bankruptcy estate. A direct action by Edge against Duke, if successful, would likely result in a claim by Duke against the estates. But that claim would be counterbalanced by the elimination of a secured claim by Edge, as Duke will have paid for the gas. There would be no net change to the bankruptcy estates. Thus, assuming Duke has paid the debtors for the gas, Edge could pursue direct actions against Duke, to the extent that such actions exist under applicable non-bankruptcy law.

On the other hand, if the debtors prevail in that adversary proceeding, then the credit by Duke will be voided, Duke will owe the debtors for the gas purchased by the debtors from Edge and sold to Duke, and the debtors will obtain a judgment against Duke for the outstanding amount due for the purchase of the gas. Under that circumstance, Edge would hold a security interest in the proceeds due to the debtors.

The debtors would hold a judgment against Duke. The judgment would be property of the respective bankruptcy estates. 11 U.S.C. § 541. Edge would hold a security interest in the proceeds due under the judgment.

The filing of the bankruptcy petitions by the debtors operated as a stay applicable to all entities of certain

activities, including exercising control over property of the bankruptcy estate, enforcing a lien against property of the bankruptcy estate and collecting or recovering a pre-bankruptcy petition claim. 11 U.S.C. § 362 (a) (3), (4), (5) and (6); All Trac Transp., Inc. v. Transp. Alliance Bank (In re All Trac Transp., Inc.), 306 B.R. 859, 872 (Bankr. N.D. Tex. 2004). Edge could not, therefore, pursue its security interest directly against Duke without obtaining relief from the automatic stay pursuant to 11 U.S.C. § 362(d). The court has not granted relief to Edge to pursue its security interest in property of the bankruptcy estates.

A direct action by Edge to collect from Duke would interfere with the debtors efforts to collect property of the estate, as Edge and the debtors would, in essence, be pursuing Duke for the same collection. Edge cannot interfere with the debtors' pursuit of property of the bankruptcy estates, absent leave of the bankruptcy court. Under the Supremacy Clause of the U.S. Constitution, U.S. Const. Art. VI, cl. 2, the automatic stay of the Bankruptcy Code prevails over Edge's non-bankruptcy claims against Duke. See In re First Texas Petroleum, Inc., 52 B.R. 322, 325 (Bankr. N.D. Tex. 1985). Accordingly, in the event that the debtors prevail in the adversary proceeding against Duke, this adversary proceeding must be dismissed. Edge's remedy would be to pursue its security interest in the bankruptcy cases or obtain relief from the stay.

Accordingly, on this summary judgment record, Edge had a perfected security interest in the gas sold through Upstream to the debtors and sold by the debtors to Duke. If Duke paid for the gas, then Edge holds a perfected security interest in the proceeds owned by or received by the debtors from Duke. Edge must pursue its security interest in the proceeds by the bankruptcy claims process. To the extent that Edge has a separate claim against Duke under applicable non-bankruptcy law, Edge could pursue that

claim. If Duke has not paid for the gas, then Edge holds a perfected security interest in the proceeds due from Duke to the debtors. Edge's ability to pursue collection however would be stayed by § 362 of the Bankruptcy Code.

Duke Purchase Free and Clear

Assuming that Duke has not paid for the gas and Edge obtains relief from the automatic stay, the court considers the reach of Edge's security interest and statutory lien to the sale of the gas by Duke to third persons. Addressing the statutory reach of the security interest, the State Bar Committee Official Comment observes, "[t]his section gives interest owners rights to oil production in the hands of a 'first purchaser' and his transferees." Tex. Bus. & Com. Code § 9.343 official cmt. at ¶ 1. The first purchaser may terminate the security interest or statutory lien by paying, or by making and keeping open a tender of, the amount the first purchaser believes to be due the interest owner. Tex. Bus. & Com. Code § 9.343(1). The debtors have not paid Edge for the gas. The debtors did not provide for any of the alternative statutory methods to terminate Edge's security interest or statutory lien. Section 9.343(1). Consequently, the first purchaser did not terminate the security interest or statutory lien.

The person who buys from the first purchaser may buy the gas free and clear of the interest owner's security interest or statutory lien if the person meets one of the conditions enumerated in § 9.343(m), quoted above. The court must determine whether Duke cut off the security interest or the statutory lien in the gas or its proceeds by one of the statutory methods.

Edge contends that Duke failed to take any of the statutory measures to assure that it bought gas from the debtors free and clear of Edge's security interest or

statutory lien. Duke counters that it had no need to take any of these measures because it paid the debtors for the gas. With the debtors paid, Duke argues that did not hold proceeds of the gas production "due to the first purchaser" under § 9.343(c). Consequently, it contends that it had no reason to take any of the steps provided in § 9.343(m).

Edge's security interest and statutory lien attached to the gas and the proceeds from the sale of the gas. If Duke paid the debtors for the gas, then Duke would not hold proceeds of gas production "due to the first purchaser." If Duke did not pay for the gas, then Duke would hold proceeds of gas production "due to the first purchaser." In addition, Duke bought the gas. The gas was subject to Edge/s security interest. with the issue of the payment for the gas subject to a genuine dispute and with the gas sold subject to the security interest and statutory lien, the court considers whether Duke bought the gas or held the proceeds free and clear of the security interest and statutory lien pursuant to § 9.343(m).

There is no genuine issue of material fact that Duke did not obtain Edge's express consent for the sale. Tex. Bus. & Com. Code § 9.343 (m) (2). Edge impliedly consented to the debtor's resale of the gas on the market. The parties do not contend that implied consent meets the consent requirement to allow the transfer of the gas free and clear of Edge's security interest and statutory lien. The court notes that the implied consent issue is material to Edge's conversion claim, addressed below.

Duke did not ensure that the debtors paid Edge or Edge's operator. Id. at § 9.343(m) (3). Duke did not withhold or assure that another withheld funds sufficient to pay for the gas. Id. at § 9.343 (m) (4).

There is a genuine issue of material fact of whether

Duke bought the gas in the ordinary course of the debtors' business. Id. at § 9.343(m) (1). There is summary judgment evidence that the debtors and Duke regularly and customarily bought and sold gas. There is further summary judgment evidence that Duke negotiated a pre-payment system with the debtors to obtain discounted prices for gas. Duke took extra-contractual measures to pay for gas after it concluded that it overpaid the debtors for gas. Those extra-contractual measures are the subject of litigation. On this record, the court cannot find that an extra-contractual setoff would be outside the ordinary course of business in this industry. Consequently, the issue of the purchase by Duke in the ordinary course of the debtors' business must be resolved by a trial. Until the § 9.343(m) (1) issue is resolved at trial, the court cannot conclude whether or not Duke purchased the gas in the ordinary course of business and, if payment is due to the debtors, holds proceeds subject to Edge's security interest and statutory lien. If Duke bought the gas from the debtors in the ordinary course of the debtors' business, then Duke would have purchased the gas free and clear of Edge's security interest and statutory lien. If Duke did not purchase the gas from the debtors in the ordinary course of the debtors' business, then Duke would not have purchased the gas free and clear of Edge's security interest and statutory lien.

Conversion

Assuming that Duke did not purchase the gas in the ordinary course of the debtors' business, the gas when purchased by Duke would have been subject to Edge's security interest and statutory lien. Assuming further that the debtors prevail in the collection adversary proceeding against Duke, the proceeds of the gas when sold by Duke would have been subject to Edge's security interest and statutory lien. If Duke prevails in the collection adversary proceeding, Edge would not have a security interest or

statutory lien on proceeds held by Duke from the sale of the gas by Duke to third persons, but the security interest and statutory lien in the gas itself would have existed. Edge contends that by selling the gas without paying the proceeds to Edge, Duke converted Edge's interest in property.

Under Texas law, conversion is established by proving that: (1) the plaintiff owned, had legal possession of, or was entitled to possession of the property; (2) defendant assumed and exercised dominion and control over the property in an unlawful and unauthorized manner; and (3) defendant refused plaintiff's demand for the return of the property. Russell v. Am. Real Estate Corp., 89 S.W.3d 204, 210 (Tex. App.--Corpus Christi, 2002, no pet.). Stated somewhat differently, conversion is "the wrongful exercise of dominion and control over another's property in denial of or inconsistent with the property owner's rights." Edlund v. Bounds, 842 S.W.2d 719, 727 (Tex. App.--Dallas, 1992, writ denied). When the defendant initially acquires possession of personalty by lawful means, conversion generally occurs upon refusal of a demand for return of the property. Permian Petroleum Co. v. Petroleos Mexicanos, 934 F.2d 635, 651 (5th Cir. 1991). "'When an indebtedness can be discharged by payment of money generally, an action in conversion is inappropriate.'" Edlund, 842 S.W.2d at 727 (quoting Eckman v. Centennial Sav. Bank, 757 S.W.2d 392, 398 (Tex. App.--Dallas 1988, writ denied)). Thus, in a debtor-creditor relationship, the remedy is a money judgment for the debt, not conversion. Eckman, 757 S.W.2d at 398. The measure of damages for conversion is the value of the property at the time and place of conversion. Edlund, 842 S.W.2d at 727.

Edge agreed to sell gas to the debtors through Upstream. There is no genuine issue of material fact that Edge knew that the debtors would resell the gas. While

Duke did not obtain Edge's express consent for the debtors' sale of the gas to Duke to cut off the security interest under § 9.343(m) (2), there is nevertheless no genuine issue of material fact that Edge consented to the resale of the gas by the debtors. When Duke purchased the gas from the debtors, Duke therefore obtained dominion and control over the gas in a lawful and authorized manner, albeit subject to Edge's security interest and statutory lien.

Duke purchased gas in May before the debtors' payment was due to Edge. Likewise, Duke purchased gas in June before the debtors' payment for the gas was due to Edge. Thus, at the time of the Duke purchases, payment by the debtors was not due to Edge. Before payment was due on June 25, 2001, Edge had no right to possession of its security interest in the gas or its proceeds; that is, until the debtors defaulted on their obligation to pay Edge, Edge could not enforce its security interest in the gas or its proceeds. By the time the debtors defaulted to Edge, Duke had sold the gas. Duke sold the gas in a lawful and authorized manner. Duke obtained the proceeds of the sale of the gas in a lawful and authorized manner.

Possession of legally obtained property would not be considered converted unless the use of the property departs so far from the conditions under which it was received as to amount to an assertion inconsistent with that of the owner. Pierson v. GFH Fin. Servs. Corp., 829 S.W.2d 311, 314 (Tex. App.--Austin 1992, no writ). There is no summary judgment evidence to suggest that Duke sold the gas, obtained possession of the proceeds or used the proceeds from the sale of the gas inconsistently with gas market transactions in Texas. Edge does not request return of the gas. Edge seeks payment for the sale of the gas. There is no summary judgment evidence that Edge cannot maintain a collection action to enforce its security interest or statutory lien if it reaches Duke.

Furthermore, conversion involves taking of property without the owner's consent. If the owner impliedly consented to the disposition of the property, the owner may not maintain a claim for conversion. Pan E. Exploration Co. v. Hufo Oils, 855 F.2d 1106, 1125 (5th Cir. 1988). As the court found above, there is no genuine issue of material fact that Edge impliedly consented to the resale of the gas in the market place. Edge argues that Duke must plead consent as an affirmative defense. The court focuses on market expectations, however. As discussed above, the establishment of the security interest and statutory lien of § 9.343 had been designed to fit consistently with prevailing practices in the gas industry. At times in this litigation both Edge and Duke have left the court with the impression that neither is being particularly forthright in their approach to this dispute.

Duke sold the gas to third persons. The third persons paid Duke for the gas. As found above, Duke thereby obtained possession of the proceeds of the gas. If Duke did not pay the debtors for the gas, then Edge's security interest would have attached to the proceeds obtained by Duke and due, in turn, to the debtors. Edge's security interest secured the debtors' indebtedness to Edge. Edge could enforce its security interest. The debtors contend that Edge has not presented summary judgment evidence that it made a demand for the return of the property on Duke. Edge argues it need not make an express demand to Duke for payment. But where Edge expected the gas to be sold in the market and where Duke acted lawfully in obtaining and reselling the gas, Edge must make a demand for payment of its security interest or statutory lien as a prerequisite for an action of conversion of its collateral. Otherwise, Duke would have no reason to believe that it had possession of Edge's collateral. Duke did not need to return the gas. Duke would pay the debtors for the gas purchased from the

debtors.

But, even if a formal demand would not be needed when a statutory lien is involved, as discussed below, Edge's security interest extends only to identifiable proceeds of the gas production -- that is, the amount due to Edge for the gas sold to the debtors. That indebtedness can be discharged by payment of money. Furthermore, Edge is only entitled to the payment of that indebtedness. The measure of damages for conversion is the value of the property at the time and place of the conversion. But Edge is not entitled to the value of the property at the time of conversion. Edge is only entitled to the amount due for the gas when sold by Edge to the debtors. Because the indebtedness could be satisfied by the payment of money and Edge is not entitled to the damages for conversion, conversion is inappropriate.

Edge contends that it may pursue collection by conversion. Texas law does recognize that "in an appropriate case" a secured creditor may maintain an action for conversion if collateral has been sold without the secured creditor's consent. See Amarillo Nat. Bank v. Komatsu Zenoah America, Inc., 991 F.2d 273, 275 (5th Cir. 1993). But that case law begs the question. Edge does not seek return of the gas. Edge does not seek to repossess collateral. Edge seeks payment for the gas sold to the debtors. As discussed above, the collection of a debt by enforcing security interest in collateral does not translate into "an appropriate case" for conversion.

If Duke paid the debtors, Edge's security interest would not reach the proceeds of the sale of the gas by Duke to third persons, for the reasons stated above. Nevertheless, the gas itself would still be subject to the security interest or statutory lien. Edge contends that when Duke sold the gas but did not deliver the proceeds to Edge, Duke

converted Edge's interest in the gas itself. Alternatively, Edge contends that when Duke credited its debt to the debtors after Duke sold the gas, the act of setoff amounted to the conversion of Edge's security interest in the gas. In essence, the court understands Edge's argument as follows. Duke sold gas subject to Edge's security interest and statutory lien. Duke received the proceeds from the sale. Duke did not owe the proceeds to the debtors because Duke had paid the debtors by offset and credit. Nevertheless, Duke transformed Edge's security interest in the gas into dollars. The gas is gone. While the sale was lawful and authorized, the proceeds should have been preserved or paid to Edge. Otherwise, Edge loses its collateral. Edge concludes that amounts to conversion.

While circular, Edge's reasoning returns to the same point. Edge seeks a money judgment based on its security interest and statutory lien for the payment of the gas Edge sold through Upstream to the debtors. Edge's theory for a claim of conversion of proceeds of the sale of the gas amounts to a claim for conversion of money.

"An action for the conversion of money will lie if the money can be identified as a specific chattel." Edlund, 842 S.W.2d at 727. "An action for the conversion of money may be brought where money is (1) delivered for safekeeping; (2) intended to be kept segregated; (3) substantially in the form in which it is received or an intact fund; and (4) not the subject of a title claim by the keeper." Id. There is no summary judgment evidence that, because of Edge's security interest or statutory lien in the gas sold by the debtors to Duke and, in turn, sold by Duke to third persons, Edge intended that the proceeds of the sale by Duke be held for safe keeping in a segregated account and intact. Furthermore, Duke obtained title to the proceeds, whatever Edge's security interest may have been. See also Estate of Townes v. Townes, 867 S.W.2d 414, 419-20

(Tex. App.--Houston [14th Dist.] 1993, writ denied).

This is not a situation where the proceeds of the sale of the gas had to be held in trust for the interest owners. See Suddarth v. Poor, 546 S.W.2d 138 (Tex. Civ. App.--Tyler 1977, writ ref'd n.r.e.). Nor is this a situation where Duke had notice of Edge's security interest or statutory lien. Texas case law recognizes that a person who accepts and benefits from proceeds subject to a statutory lien, with actual notice of the lien, may be subject to a claim for conversion of the proceeds by the lienholder. Home Indem. Co. v. Pate, 814 S.W.2d 497, 498-99 (Tex. App.--Houston [1st Dist.] 1991, writ denied). Thus, where an attorney in a workers' compensation case knows that he has received settlement proceeds subject to the compensation insurance carrier's first priority in the funds, but disburses the funds anyway, the attorney may be subject to a claim of conversion of the proceeds. Prewitt and Sampson v. City of Dallas, 713 S.W.2d 720, 722 (Tex. App.-Dallas 1986, writ ref'd n.r.e.). Edge has not presented summary judgment evidence that Duke had actual notice of Edge's security interest or statutory lien. Furthermore, Edge has not presented summary judgment evidence that Duke had actual notice that the debtors had not paid Upstream for the gas. While the court presumes that Duke has knowledge of § 9.343, that does not translate into actual notice that the debtors did not pay Edge or that Duke purchased gas bought by the debtors from Edge. On this summary judgment record, Duke only knows that it bought gas carried in a pipeline from the debtors. Edge may not maintain a claim for conversion of money.

Edge argues that without a claim for conversion, it loses its statutory protection, thereby defeating the statute's policy. Edge further argues that imposing an obligation on Duke does not work a hardship on Duke. Edge asserts that a purchaser of gas from a "first purchaser" under § 9.343

may protect itself from an interest owner's security interest or statutory lien by meeting one of the elements of § 9.343(m). If the subsequent purchaser fails to obtain those protections, then it acts at its peril in selling gas without preserving the proceeds for the interest owner. If double liability results, namely, to the first purchaser for the purchase of the gas and to the interest owner if the first purchaser fails to pay the interest owner, the double liability results only because of a failure to attain the protection of § 9.343(m). But, Edge argues, the interest owner's protections must prevail under the statute.

The court has analyzed the conversion claim on this summary judgment record because Edge, Duke and the debtors/intervenors all ask the court to attempt to resolve the adversary proceeding on their competing summary judgment motions. In analyzing the conversion claim the court has therefore assumed that Duke did not purchase the gas free and clear of Edge's interest under § 9.343(m). There is a genuine issue for trial of whether Duke purchased the gas from the debtors in the ordinary course of the debtors' business. Nevertheless, the court's analysis of the Texas law on conversion does not result in undermining the public policy of § 9.343. The court has merely held that Edge's claim of conversion cannot be maintained. In part, that is because Edge has not established that Duke did not act lawfully, obtaining property consistent with market practices and/or with Edge's implied consent. Further, that is because Edge has not established that it cannot obtain a money judgment based on its collateral in a debtor/creditor context. Further, that is also because Edge itself did not establish a contractual basis with Duke or actual notice to Duke for a claim of conversion of money.

The court does address one other issue. Both Duke and the debtors contend that Edge may only assert a security interest in "identifiable" proceeds under § 9.343(c). Apparently, the debtors and Duke would impose a requirement that specific dollars be traced from the sale of the gas. That reading would nullify the security interest granted in the proceeds from the gas production. A statute should not be read to defeat its purpose. See In re G.R.M., F.A.M., and N.D.M., 45 S.W.3d 764, 770 (Tex. App.--Fort Worth 2001, no pet.) ("In construing a statute, our primary aim is to give effect to the legislature's intent. . . . Our construction of the provisions must be consistent with their underlying purpose and the policies they promote."). The Legislature intended that the statute recognize prevailing practices in the gas industry. Thus, for example, the Legislature concluded that it seemed an undue burden to change historic ways of doing business to require gas pipeline companies and gathering systems to insist on paying individual interest owners directly. The statute therefore allows payments to someone else in a chain to ultimately discharge the interest owner's security interest or statutory lien. Tex. Bus. & Com. Code § 9.343 official cmt. at ¶ 9. Under this payment scheme, tracing of actual dollars would be unnecessary and counterproductive, undermining the very nature of permitting payments through a chain to ultimately reach the interest owners.

Section 9.343(c) recognizes the security interest in "gas production" and "in the identifiable proceeds of that production." In reading this provision, the court must give significance to every word. The word "identifiable" must be read in the context of the sentence. The court must consider the particular statutory language, the design of the statute as a whole and its object and policy. The court must avoid a reading that would create internal inconsistencies or contradictions. But where the statutory scheme is coherent and consistent, the court generally need not inquire beyond

the statute's language. Celadon Trucking Svcs., Inc. v. Titan Textile Co., Inc., 130 S.W.3d 301, 305 (Tex. App.--Houston [14th Dist.] 2004, pet. filed).

"Identifiable" commonly means "subject to identification; capable of being identified." "Identify" means "to link in an inseparable fashion" or "to join with some interest." Webster's Third New Int'l Dictionary 1123 (1993). Black's Law Dictionary defines "identify" as "[t]o look upon as being associated with" or "[t]o specify ... as the object of a contract." Black's Law Dictionary 748 (7th ed. 1999). Applying these common meanings, "identified" proceeds "of that production" means proceeds linked to or joined with the gas production subject to the security interest; the proceeds associated with the gas production subject to the security interest. The statute thus extends the security interest to the proceeds that can be identified as associated with or linked to the gas production.

The statute does not require that, to be identifiable, the actual dollars obtained from the sale of the gas be traced. That reading would be inconsistent with the design of the statute as a whole and its object and policy. Rather, it requires that the security interest be limited to only the proceeds linked with or associated with the actual gas production subject to the security interest.

Thus, presumably, the debtors sold the gas to Duke for an amount greater than the debtors would have paid Edge. Edge's security interest only extends to the proceeds due from Duke to the debtors identified with the gas sold by Edge to the debtors. That limits the security interest to the amount due by the debtors to Edge, which accomplishes the purpose of the statute, namely, to assure payment of interest owners while not disrupting the market for the sale of gas in Texas.

Edge therefore has no requirement to trace the dollars from Duke's sale of the gas to have a security interest in identifiable proceeds of the gas production.

Duke and the debtors may also argue that the gas itself must be traced. All parties know that the gas is delivered into a pipeline and commingled with other gas in the pipeline. It is disingenuous for Duke, a player in that market, to even suggest that the gas must be traced. See Tex. Bus. & Com. Code § 9.336. If Edge could maintain a claim of conversion, it is based on the loss of collateral, not on the sale of volumes of gas from the pipeline.

Summary

Edge had a security interest and statutory lien in the gas and in the proceeds of the gas owed by, received by or due to the debtors. If Duke paid the debtors for the gas, Edge may pursue its secured claim against the debtors. Edge would not have a security interest in the proceeds of the gas sold by Duke to third persons. If Duke has not paid the debtors for the gas, Edge would have a lien on the gas and the proceeds obtained by Duke, unless Duke bought the gas free and clear of Edge's lien pursuant to § 9.343(m). Edge may not, however, maintain a claim against Duke, if Duke has not paid the debtors for the gas, without obtaining relief from the automatic stay. There is a genuine issue of material fact of whether Duke purchased the gas in the ordinary course of the debtors' business. Whether or not Duke paid the debtors for the gas and whether or not Duke bought the gas in the ordinary course of the debtors' business, Edge may not maintain a claim of conversion against Duke.

Based on the foregoing,

IT IS ORDERED that the motion of Duke Energy

Trading and Marketing, L.L.C., to strike plaintiff's supplemental appendix is **DENIED**.

IT IS FURTHER ORDERED that the motion for summary judgment filed by Edge Petroleum Operating Co., Inc., is **DENIED**.

IT IS FURTHER ORDERED that the motion for summary judgment filed by Duke Energy Trading and Marketing, L.L.C., is **GRANTED**.

IT IS FURTHER ORDERED that the motion for summary judgment filed by GPR Holdings, L.L.C., Golden Prairie Supply Services, L.L.C., and Aurora Natural Gas, L.L.C., is **GRANTED**.

IT IS FURTHER ORDERED that this adversary proceeding is **DISMISSED**.

U.S. COURT OF APPEALS
FILED
MAY 07 2007
CHARLES R. FULBRUGE III
CLERK

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 05-11492

In the Matter of: TXNB INTERNAL CASE
Debtor

EDGE PETRLEUM OPERATING COMPANY INC.
Appellant

v.

GPR HOLDINGS LLC; AURORA NATURAL GAS LLC;
DUKE ENERGY TRADING AND MARKETING LLC;
GOLDEN PRAIRIE SUPPLY SERVICES LLC
Appellees

Appeal from the United States District Court for the
Northern District of Texas, Dallas

ON PETITION FOR REHEARING AND REHEARING EN BANC

(Opinion 3/28/073, 5 Cir., _____, _____ F.3d _____)

Before SMITH, BENAVIDES, and PRADO, Circuit Judges.

PER CURIAM:

(√) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (Fed. R. App. P. and 5th Cir. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Jerry Smith
United States Circuit Judge

REHG-4A

Chief Judge Jones did not participate in the consideration of rehearing en banc.

Judge Dennis did not participate in the consideration of rehearing en banc.

V.T.C.A., Bus. & C. § 9.343

Effective July 1, 2001

§ 9.343. Oil and Gas Interests: Security Interest Perfected Without Filing; Statutory Lien

(a) This section provides a security interest in favor of interest owners, as secured parties, to secure the obligations of the first purchaser of oil and gas production, as debtor, to pay the purchase price. An authenticated record giving the interest owner a right under real property law operates as a security agreement created under this chapter. The act of the first purchaser in signing an agreement to purchase oil or gas production, in issuing a division order, or in making any other voluntary communication to the interest owner or any governmental agency recognizing the interest owner's right operates as an authentication of a security agreement in accordance with Section 9.203(b) for purposes of this chapter.

(b) The security interest provided by this section is perfected automatically without the filing of a financing statement. If the interest of the secured party is evidenced by a deed, mineral deed, reservation in either, oil or gas lease, assignment, or any other such record recorded in the real property records of a county clerk, that record is effective as a filed financing statement for purposes of this chapter, but no fee is required except a fee that is otherwise required by the county clerk, and there is no requirement of refiling every five years to maintain effectiveness of the filing.

(c) The security interest exists in oil and gas production, and also in the identifiable proceeds of that production owned by, received by, or due to the first purchaser:

(1) for an unlimited time if:

(A) the proceeds are oil or gas production, inventory of raw, refined, or manufactured oil or gas production, or rights to or products of any of those, although the sale of those proceeds by a first purchaser to a buyer in the ordinary course of business as provided in Subsection (e) cuts off the security interest in those proceeds;

(B) the proceeds are accounts, chattel paper, instruments, documents, or payment intangibles; or

(C) the proceeds are cash proceeds, as defined in Section 9.102; and

(2) for the length of time provided in Section 9.315 for all other proceeds.

(d) This section creates a lien that secures the payment of all taxes that are or should be withheld or paid by the first purchaser and a lien that secures the rights of any person who would be entitled to a security interest under Subsection (a) except for lack of any adoption of a security agreement by the first purchaser or a lack of possession or record required by Section 9.203 for the security interest to be enforceable.

(e) The security interests and liens created by this section have priority over any purchaser who is not a buyer in the ordinary course of the first purchaser's business, but are cut off by the sale to a buyer from the first purchaser who is in the ordinary course of the first purchaser's business under Section 9.320(a). But in either case, whether or not the buyer from the first purchaser is in ordinary course, a security interest will continue in the proceeds of the sale by the first purchaser as provided in Subsection (c).

(f) The security interests and all liens created by this section have the following priorities over other Chapter 9 security interests:

(1) A security interest created by this section is treated as a purchase-money security interest for purposes of determining its relative priority under Section 9.324 over other security interests not provided for by this section. A holder of a security interest created under this section is not required to give the written notice every five years as provided in Section 9.324(b)(3) to have purchase-money priority over a security interest with a prior financing statement covering inventory.

(2) A statutory lien is subordinate to all other perfected Chapter 9 security interests and has priority over unperfected Chapter 9 security interests and the lien creditors, buyers, and transferees mentioned in Section 9.317.

(g) The security interests and liens created by this section have the following priorities among themselves:

(1) If a record effective as a filed financing statement under Subsection (b) exists, the security interests perfected by that record have priority over a security interest automatically perfected without filing under Subsection (b). If several security interests perfected by records exist, they have the same priority among themselves as established by real property law for interests in oil and gas in place. If real property law establishes no priority among them, they share priority pro rata.

(2) A security interest perfected automatically without filing under Subsection (b) has priority over a lien created under Subsection (d).

(3) A nontax lien under Subsection (d) has priority over a lien created under that subsection that secures the payment of taxes.

(h) The priorities for statutory liens mentioned in Section 9.333 do not apply to any security interest or statutory lien created by this section. But if a pipeline common carrier has a statutory or tariff lien that is effective and enforceable against a trustee in bankruptcy and not invalidated by the Federal Tax Lien Act, that lien has priority over the security interests and statutory liens created by this section.

(i) If oil or gas production in which there are security interests or statutory liens created by this section is commingled with inventory or other production, the rules of Section 9.336 apply.

(j) A security interest or statutory lien created by this section remains effective against the debtor and perfected against the debtor's creditors even if assigned, regardless of whether the assignment is perfected against the assignor's creditors. If a deed, mineral deed, assignment of oil and gas lease, or other such record evidencing the assignment is filed in the real property records of the county, it will have the same effect as filing an amended financing statement under Section 9.514.

(k) This section does not impair an operator's right to set-off or withhold funds from other interest owners as security for or in satisfaction of any debt or security interest. In case of a dispute between an operator and another interest owner, a good faith tender of funds by anyone to the person who the operator and other interest owner agree on, to a person who otherwise shows himself or herself to be the one entitled to the funds, or to a court of

competent jurisdiction in the event of litigation or bankruptcy operates as a tender of the funds to both.

(l) A first purchaser who acts in good faith may terminate an interest owner's security interest or statutory lien under this section by paying, or by making and keeping open a tender of, the amount the first purchaser believes to be due to the interest owner:

(1) if the interest owner's rights are to oil or gas production or its proceeds, either to the operator alone, in which event the operator is considered the first purchaser, or to some combination of the interest owner and the operator, as the first purchaser chooses;

(2) whatever the nature of the production to which the interest owner has rights, to the person that the interest owner agreed to or acquiesced in; or

(3) to a court of competent jurisdiction in the event of litigation or bankruptcy.

(m) A person who buys from a first purchaser can ensure that the person buys free and clear of an interest owner's security interest or statutory lien under this section:

(1) by buying in the ordinary course of the first purchaser's business from the first purchaser under Section 9.320(a);

(2) by obtaining the interest owner's consent to the sale under Section 9.315(a)(1);

(3) by ensuring that the first purchaser has paid the interest owner or, provided that gas production is involved, or the interest owner has so agreed or acquiesced,

by ensuring that the first purchaser has paid the interest owner's operator; or

(4) by ensuring that the person or the first purchaser or some other person has withheld funds sufficient to pay amounts in dispute and has maintained a tender of those funds to whoever shows himself or herself to be the person entitled.

(n) If a tender under Subsection (m)(4) that is valid thereafter fails, the security interest and liens governed by this section remain effective.

(o) In addition to the usual remedy of sequestration available to secured parties, and the remedies given in Subchapter F[32], the holders of security interests and liens created by this section have available to them, to the extent constitutionally permitted, the remedies of replevin, attachment, and garnishment to assist them in realizing upon their rights.

(p) The rights of any person claiming under a security interest or lien created by this section are governed by the other provisions of this chapter except to the extent that this section necessarily displaces those provisions. This section does not invalidate or otherwise affect the interests of any person in any real property before severance of any oil or gas production.

(q) The security interest created under Subsections (a) and (b) do not apply to proceeds of gas production that have been withheld, in cash or account form, by a purchaser under Section 201.204(c), Tax Code.

(r) In this section:

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[32] V.T.C.A., Bus. & C. § 9.601 et seq.

(1) "Oil and gas production" means any oil, natural gas, condensate of either, natural gas liquids, other gaseous, liquid, or dissolved hydrocarbons, sulfur, or helium, or other substance produced as a by-product or adjunct to their production, or any combination of these, which is severed, extracted, or produced from the ground, the seabed, or other submerged lands within the jurisdiction of this state. Any such substance, including recoverable or recovered natural gas liquids, that is transported to or in a natural gas pipeline or natural gas gathering system, or otherwise transported or sold for use as natural gas, or is transported or sold for the extraction of helium or natural gas liquids is "gas production." Any such substance that is transported or sold to persons and for purposes not included in the foregoing natural gas definition is "oil production."

(2) "Interest owner" means a person owning an entire or fractional interest of any kind or nature in oil or gas production at the time of severance, or a person who has an express, implied, or constructive right to receive a monetary payment determined by the value of oil or gas production or by the amount of production.

(3) "First purchaser" means the first person that purchases oil or gas production from an operator or interest owner after the production is severed, or an operator that receives production proceeds from a third-party purchaser who acts in good faith under a division order or other agreement authenticated by the operator under which the operator collects proceeds of production on behalf of other interest owners. To the extent the operator receives proceeds attributable to the interest of other interest owners from a third-party purchaser who acts in good faith under a division order or other agreement authenticated by such operator, the operator is considered to be the first purchaser of the production for all purposes under this section, notwithstanding the characterization of other persons as

first purchasers under other laws or regulations. To the extent the operator has not received from the third-party purchaser proceeds attributable to the operator's interest and the interest of other interest owners, the operator is not considered the first purchaser for the purposes of this section and is entitled to all rights and benefits under this section. Nothing in this section impairs or affects any rights otherwise held by a royalty owner to take its share of oil in kind or receive payment directly from a third-party purchaser for the royalty owner's share of oil production with or without a previously made agreement.

(4) "Operator" means a person engaged in the business of severing oil or gas production from the ground, whether for the person alone, only for other persons, or for the person and others.

CREDIT(S)

Added by Acts 1999, 76th Leg., ch. 414, § 1.01, eff. July 1, 2001.

28 USC Sec. 1334

Effective: 01/03/05

TITLE 28--JUDICIARY AND JUDICIAL PROCEDURE
PART IV--JURISDICTION AND VENUE
CHAPTER 85--DISTRICT COURTS; JURISDICTION

Sec. 1334. Bankruptcy cases and proceedings

(a) Except as provided in subsection (b) of this section, the district courts shall have original and exclusive jurisdiction of all cases under title 11.

(b) Except as provided in subsection (e)(2), notwithstanding any Act of Congress that confers exclusive jurisdiction on a court or courts other than the district courts, the district courts shall have original but not exclusive jurisdiction of all civil proceedings arising under title 11, or arising in or related to cases under title 11.

(c) (1) Except with respect to a case under chapter 15 of title 11, nothing in this section prevents a district court in the interest of justice, or in the interest of comity with State courts or respect for State law, from abstaining from hearing a particular proceeding arising under title 11 or arising in or related to a case under title 11.

(2) Upon timely motion of a party in a proceeding based upon a State law claim or State law cause of action, related to a case under title 11 but not arising under title 11 or arising in a case under title 11, with respect to which an action could not have been commenced in a court of the United States absent jurisdiction under this section, the district court shall abstain from hearing such proceeding if an

action is commenced, and can be timely adjudicated, in a State forum of appropriate jurisdiction.

(d) Any decision to abstain or not to abstain made under this subsection (c) (other than a decision not to abstain in a proceeding described in subsection (c)(2)) is not reviewable by appeal or otherwise by the court of appeals under section 158(d), 1291, or 1292 of this title or by the Supreme Court of the United States under section 1254 of this title. Subsection (c) and this subsection shall not be construed to limit the applicability of the stay provided for by section 362 of title 11, United States Code, as such section applies to an action affecting the property of the estate in bankruptcy.

(e) The district court in which a case under title 11 is commenced or is pending shall have exclusive jurisdiction

(1) of all of the property, wherever located, of the debtor as of the commencement of such case, and of property of the estate; and

(2) over all claims or causes of action that involve construction of section 327 of title 11, United States Code, or rules relating to disclosure requirements under section 327.

-SOURCE-

(June 25, 1948, ch. 646, 62 Stat. 931; Pub. L. 95-598, title II, Sec. 238(a), Nov. 6, 1978, 92 Stat. 2667; Pub. L. 98-353, title I, Sec. 101(a), July 10, 1984, 98 Stat. 333; Pub. L. 99-554, title I, Sec. 144(e), Oct. 27, 1986, 100 Stat. 3096; Pub. L. 101-650, title III, Sec. 309(b), Dec. 1, 1990, 104 Stat. 5113; Pub. L. 103-394, title I, Sec. 104(b), Oct. 22, 1994, 108 Stat. 4109.)

Federal Rules of Bankruptcy Procedure, Rule 9027

Rule 9027. Removal

(a) Notice of Removal

(1) Where Filed; Form and Content

A notice of removal shall be filed with the clerk for the district and division within which is located the state or federal court where the civil action is pending. The notice shall be signed pursuant to Rule 9011 and contain a short and plain statement of the facts which entitle the party filing the notice to remove, contain a statement that upon removal of the claim or cause of action the proceeding is core or non-core and, if non-core, that the party filing the notice does or does not consent to entry of final orders or judgment by the bankruptcy judge, and be accompanied by a copy of all process and pleadings.

(2) Time for Filing; Civil Action Initiated Before Commencement of the Case Under the Code

If the claim or cause of action in a civil action is pending when a case under the Code is commenced, a notice of removal may be filed only within the longest of (A) 90 days after the order for relief in the case under the Code, (B) 30 days after entry of an order terminating a stay, if the claim or cause of action in a civil action has been stayed under Sec. 362 of the Code, or (C) 30 days after a trustee qualifies in a chapter 11 reorganization case but not later than 180 days after the order for relief.

(3) Time for filing; civil action initiated after commencement of the case under the Code

If a claim or cause of action is asserted in another court after the commencement of a case under the Code, a notice of removal may be filed with the clerk only within the shorter of (A) 30 days after receipt, through service or otherwise, of a copy of the initial pleading setting forth the claim or cause of action sought to be removed, or (B) 30 days after receipt of the summons if the initial pleading has been filed with the court but not served with the summons.

(b) Notice

Promptly after filing the notice of removal, the party filing the notice shall serve a copy of it on all parties to the removed claim or cause of action.

(c) Filing in Non-Bankruptcy Court

Promptly after filing the notice of removal, the party filing the notice shall file a copy of it with the clerk of the court from which the claim or cause of action is removed. Removal of the claim or cause of action is effected on such filing of a copy of the notice of removal. The parties shall proceed no further in that court unless and until the claim or cause of action is remanded.

(d) Remand

A motion for remand of the removed claim or cause of action shall be governed by Rule 9014 and served on the parties to the removed claim or cause of action.

(e) Procedure After Removal

(1) After removal of a claim or cause of action to a district court the district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge, may issue all necessary orders and process to bring before it all proper parties whether served by process issued by the court from which the claim or cause of action was removed or otherwise.

(2) The district court or, if the case under the Code has been referred to a bankruptcy judge of the district, the bankruptcy judge may require the party filing the notice of removal to file with the clerk copies of all records and proceedings relating to the claim or cause of action in the court from which the claim or cause of action was removed.

(3) Any party who has filed a pleading in connection with the removed claim or cause of action, other than the party filing the notice of removal, shall file a statement admitting or denying any allegation in the notice of removal that upon removal of the claim or cause of action the proceeding is core or non-core. If the statement alleges that the proceeding is non-core, it shall state that the party does or does not consent to entry of final orders or judgment by the bankruptcy judge. A statement required by this paragraph shall be signed pursuant to Rule 9011 and shall be filed not later than 10 days after the filing of the notice of removal. Any party who files a statement pursuant to this paragraph shall mail a copy to every other party to the removed claim or cause of action.

(f) Process After Removal

If one or more of the defendants has not been served with process, the service has not been perfected prior to removal, or the process served proves to be defective, such process or service may be completed or new process issued pursuant to Part VII of these rules. This subdivision shall not deprive any defendant on whom process is served after removal of the defendant's right to move to remand the case.

(g) Applicability of Part VII

The rules of Part VII apply to a claim or cause of action removed to a district court from a federal or state court and govern procedure after removal. Repleading is not necessary unless the court so orders. In a removed action in which the defendant has not answered, the defendant shall answer or present the other defenses or objections available under the rules of Part VII within 20 days following the receipt through service or otherwise of a copy of the initial pleading setting forth the claim for relief on which the action or proceeding is based, or within 20 days following the service of summons on such initial pleading, or within five days following the filing of the notice of removal, whichever period is longest.

(h) Record Supplied

When a party is entitled to copies of the records and proceedings in any civil action or proceeding in a federal or a state court, to be used in the removed civil action or proceeding, and the clerk of the federal or state court, on demand accompanied by payment or tender of the lawful fees, fails to deliver certified copies, the court may, on affidavit reciting the facts, direct such record to be supplied by affidavit or otherwise. Thereupon the proceedings, trial

and judgment may be had in the court, and all process awarded, as if certified copies had been filed.

(i) Attachment or Sequestration; Securities

When a claim or cause of action is removed to a district court, any attachment or sequestration of property in the court from which the claim or cause of action was removed shall hold the property to answer the final judgment or decree in the same manner as the property would have been held to answer final judgment or decree had it been rendered by the court from which the claim or cause of action was removed. All bonds, undertakings, or security given by either party to the claim or cause of action prior to its removal shall remain valid and effectual notwithstanding such removal. All injunctions issued, orders entered and other proceedings had prior to removal shall remain in full force and effect until dissolved or modified by the court.

CREDIT(S)

(As amended Mar. 30, 1987, eff. Aug. 1, 1987; Apr. 30, 1991, eff. Aug. 1, 1991; Apr. 29, 2002, eff. Dec. 1, 2002.)

[AURION TECHNOLOGIES, INC.
LETTERHEAD]

July 23, 2001

Memorandum

To: Jon Milliken, President
Fisher-Rosemount Flow Computers

From: Chuck H. Moseley, Vice President – Business Development, Aurion Technologies, Inc.

I want to take this opportunity to update you on the Fisher/Aurion relationship and to advise you of several changes we are making at Aurion.

Aurion is pleased with the progress of its arrangement to host data on the Internet from communication enabled flow computers, including the new eFlow product, marketed by Fisher through its worldwide distributor network. We faced numerous challenges in the early deployments of the Aurion web presentation for your customers. I am happy to report that, working together, these challenges were met and turned into opportunities. Aurion is delighted to be associated with Fisher. The relationship that has grown in the early stages of deployment will serve each company and customer well as we move toward the broad scope of technology application each of us expects.

You may have received information that has been circulating in the industry regarding companies that are affiliated to Aurion via ownership. We wish to clarify any perception that difficulties in those companies extend to Aurion.

Today, Aurion's majority shareholder is ANG Holdings, LLC. Aurion also holds substantial equity investments from more than thirty additional shareholders – both strategic and institutional investors. Those shareholders include several prominent public corporations in the United States and Canada and that list is expected to grow as we execute our development plan. An independent board of directors governs Aurion. The company also has an experienced operating management and staff that are totally separate from ANG and its other, wholly owned, subsidiaries. Aurion has no significant business relationships with or dependency on any ANG subsidiary but has, since its formation, relied on ANG for operating capital flexibility and support. Due to its own issues, ANG will no longer support Aurion financially.

Since these developments, Aurion has worked diligently to secure funding from independent sources and from within its existing shareholder group. With that task now largely completed, the company will refocus its efforts on existing market initiatives and alter some of its operating processes. Aurion will reduce its staff, curtail nonessential operating costs and defer some development activities. Aurion will retain a lean but extremely strong support staff behind its Internet application product line. As Fisher and its distributors promote Internet-based data monitoring to their customers I want you to know you can continue to look to Aurion with confidence.

Please call me if you or any distributor has a question.

Sincerely,

Chuck H. Moseley

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Tel 214-210-9400, Fax 214-210-9408